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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 563

THE UNITED STATES OF AMERICA, PETITIONER

vs.

**L. MANUEL HENDLER, AS TRANSFEREE OF CREAM-
ERIES, INC., ETC.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1937

CERTIORARI GRANTED DECEMBER 3, 1937

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TRANSCRIPT OF RECORD

**UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, TO WIT:**

At a District Court of the United States for the District of Maryland, begun and held in the City of Baltimore on the First Tuesday in December (being the 1st day of the same month) in the year of our Lord one thousand nine hundred and thirty-six.

Present: The Honorable W. Calvin Chesnut, Judge Maryland District; Bernard J. Flynn, Esq., Attorney; August Klecka, Esq., Marshal; Arthur L. Spamer, Clerk.

Among other were the following proceedings, to wit:

L. Manuel Hendler, as Transferee of
Creameries, Inc. (formerly Hendler
Creamery Company, Inc.),

No. 5419 Law.

vs.

United States of America.

DECLARATION AS AMENDED.

Filed 11th July, 1934.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND.L. Manuel Hendler, as Transferee of
Creameries, Inc. (formerly Hendler
Creamery Company, Inc.),

Plaintiff,

No. 5419 Law.

vs.

United States of America,

Defendant.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Company, Incorporated), a citizen of the United States and a resident of Baltimore, Maryland, by Joseph Addison, William R. Semans and Barton, Wilmer, Ambler & Barton, his attorneys, sues the United States of America:

For money payable by the defendant to the plaintiff,

1. And for money received by the defendant for the use of the plaintiff.

2. And for that this is a suit of a civil nature at law, arising under the laws of the United States providing for internal revenue and the collection thereof, and that the cause of action here sued upon arose in the Judicial District of Maryland and within the jurisdiction of this Court in that the cause of action is for the recovery of internal revenue tax erroneously and illegally assessed by and paid to Galen L. Tait, an individual, formerly Collector of Internal Revenue of the United States of America for the District of Maryland, and at the time of the filing of this suit not in office as said Collector of Internal Revenue.

That on or about the 21st day of May, 1929, Hendler Creamery Company, Incorporated (later by change of

name Creameries, Inc.), entered into a contract of reorganization with The Borden Company in the following words, to wit:

"350 Madison Avenue, New York, N. Y.

May 21, 1929.

Hendler Creamery Company, Incorporated,
Baltimore, Maryland.

Dear Sirs:

We write to confirm the various understandings reached at conferences heretofore held between your and our respective officers:

FIRST: We are advised by you and, by your acceptance hereof, you unconditionally represent and agree to and with us as follows:

You are a corporation duly organized and now existing and in good standing under the laws of the State of Maryland.

You have an authorized capital stock consisting of Thirty thousand (30,000) shares of Prior Preference Stock, of the par value of One hundred dollars (\$100.) per share and the aggregate par value of Three million dollars (\$3,000,000.); Twenty thousand (20,000) shares of Preferred Stock, without par value; and Thirty thousand (30,000) shares of Common Stock, without par value. Of said authorized classes of Capital Stock there have been respectively issued and are now outstanding 14,340 shares of Prior Preferred Stock of the aggregate par value of One million, four hundred thirty-four thousand Dollars (\$1,434,000.00); Twenty thousand (20,000) shares of Preferred Stock; and Thirty thousand (30,000) shares of Common Stock. Said Prior Preference Stock bears annual dividends of Seven per cent (7%), payable January 1st, April 1st, July 1st and October 1st in each year. It is subject to redemption on any quarterly dividend date at One hundred seven and 50/100 dollars (\$107.50) per share and an amount equal to all accrued and unpaid quarterly dividends thereon, upon thirty (30) days' written notice, and the holders thereof are entitled to receive One hundred dollars (\$100.) per share and an

amount equal to the amount of dividends accumulated and unpaid thereon on dissolution of your Company. All dividends on the said Prior Preference Stock have been paid to and including that due April 1, 1929.

The Preferred Stock bears non-cumulative dividends of One and 75/100 dollars (\$1.75) per share per annum, payable on January 1st, April 1st, July 1st and October 1st in each year. After the entire issue of Prior Preference Stock shall have been redeemed or provision made therefor, and after all funded debt of the Corporation has been retired or provision made therefor, the Preferred Stock is subject to redemption on any dividend date at the price of Twenty-six and 25/100 dollars (\$26.25) per share and an amount equal to all actually declared and unpaid dividends thereon, on thirty (30) days' written notice, and the holders thereof are entitled, on dissolution of your Company and subject to the preferences of the holders of any Prior Preference Stock then outstanding, to receive Twenty-five dollars (\$25.) per share and an amount equal to the amount of all dividends actually declared prior to such dissolution and unpaid. All dividends actually declared on the said Preferred Stock have been paid to and including that due April 1, 1929.

Your Company has no bonds, mortgages or funded debt authorized or outstanding, except Six Hundred seventy-five thousand dollars (\$675,000) principal amount of First Mortgage 6% Convertible Twenty Year Gold Bonds heretofore issued under an indenture of mortgage dated July 1, 1926, made to Commonwealth Bank of Baltimore as Trustee, to secure an authorized issue aggregating not more than One Million Dollars (\$1,000,000) of said bonds. The said bonds are convertible into Prior Preference Stock of your Company in the ratio of one share of said Prior Preference Stock for each One hundred dollars (\$100) principal amount of said bonds. Such conversion may be effected at any time prior to maturity or, if the bonds be called for redemption, at any time before the day of the adoption of proper resolutions for the call of said bonds. Said bonds are subject to redemption on any interest payment date, on thirty (30) days previous notice, at the price, if the bonds are redeemed on or prior to December 31, 1929, of 107½% of their principal amount plus accrued interest. The interest dates on said bonds are

January 1st and July 1st in each year and all interest on said bonds has been paid up to and including January 1, 1929.

You or one of your subsidiary companies own the entire issued and outstanding capital stock of the following corporations, all of which are duly organized, now existing and in good standing under the laws of the State of Maryland: The Clover Ice Cream Company, the Horn Ice Cream Company and the Supreme Ice Cream Company. The entire capital stock of the Supreme Ice Cream Company was acquired by your Company since December 31, 1928, in exchange for Two thousand three hundred fifty (2,350) shares of the Prior Preference Stock of your Company.

The said Clover Ice Cream Company has an authorized capital stock consisting of twelve hundred fifty (1250) shares without par value, of which there are issued and outstanding one thousand (1000) shares, all of which are owned by the Horn Ice Cream Company. It has no bonds, mortgages or other funded debt.

The said Supreme Ice Cream Company has an authorized capital stock consisting of five thousand (5000) shares of common stock without par value, all of which are issued and outstanding, and five thousand (5000) shares of preferred stock of the par value of \$100 per share. There is no preferred stock of said Company now outstanding; all of the preferred stock heretofore issued having been retired. All of the common stock of said company is owned by your Company. It has no bonds, mortgages or other funded debt.

The said Horn Ice Cream Company has an authorized capital stock consisting of one hundred thousand (100,000) shares without par value, of which there are issued and outstanding ten thousand (10,000) shares, all of which are owned by your Company. The said Horn Ice Cream Company acquired subsequently to December 31, 1928 the Baltimore plant and the Baltimore business of Southern Dairies, Inc., including inventories and accounts receivable, for the sum of approximately One million one hundred sixty-six thousand dollars (\$1,166,000) in cash. It has no bonds, mortgages or other funded debt.

As herein used the terms "you" or "your Company" mean Hendler Creamery Company, Incorporated. The term "subsidiary companies" refers to the Clover Ice Cream Company, the Horn Ice Cream Company and the Supreme Ice Cream Company, and the term "your companies" refers to the Hendler Creamery Company, Incorporated and the said subsidiary companies collectively.

SECOND. We hereby make you the following proposition:

You shall assign and transfer to us and we shall purchase from you, pursuant to the plan of reorganization evidenced hereby, your entire property and assets, tangible and intangible, of every kind and description and wheresoever situated, as well as your business as a going concern, your trade name (including the exclusive right to do business under the name "Hendler Creamery Company, Incorporated"), your trademarks, patents, patent rights and good will. The said property and assets are to include the entire issued and outstanding capital stock of each of the subsidiary companies, but should we so request, you shall, in lieu of conveying to us the said stock, cause each of the said subsidiary companies, or such one or ones of them as we may request, to transfer and convey to us its entire property and assets, tangible and intangible, of every kind and description and wheresoever situated, as well as its business as a going concern, its trade name (including the exclusive right to do business under the corporate name of such subsidiary company), its trade-marks, patents, patent rights and good will.

However, if any shares of the capital stock of your Company are held by it in its treasury, such shares shall not be included among the assets to be conveyed to us pursuant hereto.

You shall effect a reorganization so that in exchange for the assignment, transfer and conveyance to us of your said assets and business and, should we so elect, of the assets and business of the subsidiary companies, or any of them, we will:

(a) Issue and deliver to your Company or upon its order the certificates for Eighty-six thousand seven hundred sixteen (86,716) shares of the full paid and non-assessable capital stock of our Company, of the par value of \$25 per

share and the aggregate par value of Two million one hundred sixty-seven thousand nine hundred dollars (\$2,167,900) duly listed on the New York Stock Exchange and constituting part of the authorized capital stock of our Company. On April 17, 1929 the stockholders of our Company approved a change in the par value of the shares of our capital stock, from Fifty dollars (\$50) each to Twenty-five dollars (\$25) each, and a corresponding increase in the authorized number of said shares, so that the total authorized amount of our capital stock remains unchanged at One hundred million dollars (\$100,000,000) all of one class. We reserve the right to increase our authorized capital stock to Two hundred million dollars (\$200,000,000) it being understood, however, that prior to the closing of title to us, we will not issue additional shares of our capital stock except as contemplated by this agreement and except for property acquired and/or services rendered as permitted by the laws of New Jersey.

(b) Provide for the liquidation of the said outstanding fourteen thousand, three hundred and forty (14,340) shares of your Prior Preference Stock (plus such shares of Prior Preference Stock as may be issued after the date hereof and prior to May 21, 1929 upon the conversion of the said First Mortgage Bonds of your Company) at the option of the holders thereof either (1) by payment of the sum of \$107.50 per share plus an amount equal to the accrued and unpaid dividends thereon at the rate of Seven Dollars (\$7) per share per annum accumulated to the date of the closing of title to us hereunder or, if the certificates therefor are surrendered after the closing, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, the date on which such Prior Preference Stock is to be redeemed as hereinafter provided, or (2) by the issuance of four shares of our said full paid and non-assessable capital stock, of the par value of \$25 per share, in exchange for every three shares of your Prior Preference Stock; provided, however, that we shall not be required in any event to issue fractional shares of our capital stock and that as to any holder of your Prior Preference Stock whose holdings are not divisible by three, we shall have the right to make adjustment for the odd share or shares, as follows: For each three-fourths of a share not so divisible, one full share of Borden Company stock will be

issued, and for the remaining one-fourth of a share, the Prior Preference Stockholder will receive in cash one-fourth of the redemption price of the whole share, to wit, the sum of Twenty-six and 88/100 dollars (\$26.88) plus one-fourth of the accrued dividend on such share figured in the manner provided in and by subdivision (1) above; and provided further that we shall, at least five days prior to the date fixed for closing of title to us hereunder, receive from your Company in writing a notice of the number of shares of our capital stock to be issued in liquidation of your Prior Preference Stock, pursuant to subdivision (b) of this Section Second hereof and of the names and the respective number of shares for which certificates therefor will be required by you. All holders of your Prior Preference Stock who shall not elect to receive shares of our capital stock in liquidation at least by June 14th prior to closing of title to us hereunder shall be conclusively deemed to have waived their right to receive our capital stock. Suitable arrangements shall be made by you (which arrangements shall be subject to the approval of our counsel, Messrs. Masten & Nichols) for the appointment of a responsible bank or trust company as your agent for the liquidation or redemption of your Prior Preference Stock, and all holders of such Prior Preference Stock who shall elect to take stock of our Company under clause (2) above shall be required to deposit their Prior Preference Stock certificates with said liquidating or redemption agent. All payments of cash and deliveries of our stock called for by clauses (1) and (2) above shall be made, at or before the closing of title to us hereunder, to said liquidating or redemption agent for the account of the several holders of your Prior Preference Stock as their respective interests may appear; provided, however, that for the purpose of the closing of title, said payments of cash and delivery of stock may be made to the correspondent in the City of New York of said liquidating or redemption agent. The cash so to be paid by us shall include accrued dividends to July 1, 1929 on all Prior Preference Stock of your Company the holders of which have not elected to receive Borden Company stock, it being understood that in the event any such Prior Preference Stockholder shall deposit the certificates for his Prior Preference Stock prior to July 1, 1929, a sum equal to the accrued dividends on said stock from the date of such deposit, or from the date of closing of title to us, if he has

deposited his stock prior thereto, to July 1, 1929 shall be returned to us by the liquidating or redemption agent. The cash so paid to the liquidating or redemption agent shall be applied to the liquidation and/or redemption of all of the Prior Preference Stock of your Company the holders of which shall not have elected to receive the stock of our Company, and for no other purpose. Payments of cash and/or deliveries of our stock shall be made by such liquidating or redemption agent to the respective Prior Preference Stockholders only against the surrender for cancellation of their respective stock certificates for said Prior Preference Stock properly endorsed.

(c) Assume and agree to pay all indebtedness and liabilities whatsoever of your Company and of the said subsidiary companies as the same shall exist at closing of title to us hereunder, it being understood that the liabilities so assumed by us shall not include (1) any capital stock liability; (2) any income or excess profits taxes incurred by your Company or by either or any of the said subsidiary companies by reason of the conveyance of its assets and business to us hereunder; (3) any tax incurred by your Company or by any subsidiary company whose property and business we may elect to take in respect of business transacted by you or by any such subsidiary company and/or income accrued to you or to any subsidiary company subsequent to the closing of title to us hereunder; (4) any additional income and/or excess profits taxes now or hereafter imposed upon your Company or upon any subsidiary company in respect of business transacted and/or income accrued prior to January 1, 1929; or (5) the legal fees of counsel for your companies in connection with this contract and the transfer hereby provided for and the fees and expenses of the liquidating or redemption agent for the Prior Preference Stock of your Company. All of said excepted liabilities shall be borne by you or your stockholders.

As used herein the phrase "closing of title to us" shall mean the time at which we receive the conveyance to us of the properties and business of your Company.

The certificates for the shares of the capital stock of your subsidiary companies, in the event such certificates are delivered to us pursuant hereto, shall be duly endorsed in blank for transfer and in negotiable form and

shall bear all necessary Internal Revenue stock transfer and other stamps.

THIRD. The foregoing offer and, in the event of your acceptance thereof, our obligation to complete and perform the same, is, however, subject to the following conditions precedent and to your obligations hereinafter specified, which conditions and obligations by your acceptance hereof you shall and do agree fully to comply with, observe and perform.

A. You have submitted to us balance sheets of your Company and of each of the subsidiary companies as of December 31, 1928, and profit and loss accounts of your Company, of the Horn Ice Cream Company or its predecessors in title and of the Supreme Ice Cream Company, for the calendar years 1926, 1927 and 1928, and a profit and loss account of the Clover Ice Cream Company for the last eleven months of 1928. Said balance sheets and profit and loss accounts have been identified by the signature of your Treasurer and are expressly made a part of the agreement embodied in this letter and your acceptance thereof. You represent and unconditionally agree and guarantee to us:

(a) That since the 31st day of December, 1928, and until closing of title to us hereunder, there has been and will be no change in the condition or value of the assets, property and business of your Company and/or of the Clover Ice Cream Company or in the net worth thereof as shown by the said balance sheets of said companies of December 31, 1928 and that said companies since December 31, 1928 have made and will make no disbursements or other disposition of property except such changes, disbursements and dispositions of property as are incidental to the ordinary and regular course of their respective businesses or such as are herein expressly permitted, and excepting also money borrowed and/or paid and stock issued to acquire the stock of Supreme Ice Cream Company and the Baltimore Plant of Southern Dairies, Inc., stock issued on conversion of First Mortgage Bonds of your Company and money borrowed and/or paid out by your Company to purchase or redeem its First Mortgage Bonds and excepting also monies loaned to your subsidiary companies.

(b) That since the respective dates when your Company acquired the stock of Supreme Ice Cream Company and Horn Ice Cream Company acquired the Baltimore plant of Southern Dairies, Inc., and until closing of title to us hereunder there has been and will be no change in the condition or value of the assets, property and business of Horn Ice Cream Company and/or Supreme Ice Cream Company, or in the net worth of said companies, and that said companies since said respective dates have made and will make no disbursements or other dispositions of property, except such changes, disbursements and dispositions of property as are incidental to the ordinary and regular course of their respective businesses or such as are herein expressly permitted.

(c) That until closing of title to us hereunder your companies will each conduct its business in the usual and ordinary course, will take the same care as heretofore of its business, good will and customers, and will not, without our previous written consent, make any change in its corporate structure, issue any shares of its capital stock (except Prior Preference Stock of your Company issued prior to May 21, 1929, on conversion of any of your Company's First Mortgage Bonds), create any mortgage, issue any bonds, incur any indebtedness or make any expenditures, enter into any contracts or make any other commitments except such as are incidental to the ordinary and regular conduct of its business and its current operations and requirements or such as are herein expressly permitted.

(d) That since December 31, 1928, in the case of your Company and Clover Ice Cream Company, and since the date when you acquired its capital stock in the case of the Supreme Ice Cream Company, and since the date when it acquired the Baltimore plant of Southern Dairies, Inc., in the case of Horn Ice Cream Company, your companies have not declared or paid any dividends and that until closing of title to us hereunder your companies will not declare or pay any dividends or make any other distribution to their stockholders of any class, excepting the regular dividend on the Prior Preference Stock of your Company at the regular dates therefor.

(e) That if, prior to closing of title to us hereunder, any question of more than ordinary importance shall

arise in connection with the business of your companies or any of them, you will consult us with respect thereto before a decision is reached or action taken thereon by you.

B. Upon your acceptance of this offer, you shall take all such proceedings as shall be necessary to call your outstanding Prior Preference Stock for redemption on July 1, 1929, and all such proceedings as shall be necessary to call your outstanding First Mortgage 6% Convertible Gold Bonds for redemption on July 1, 1929. All such proceedings shall be in manner and form agreeable to counsel for your Company and approved by Masten & Nichols. Proper resolutions calling the said First Mortgage Bonds for redemption shall be adopted not later than May 21, 1929. At or prior to the closing of title to us the said mortgage will be satisfied as provided by Section 3 of Article IV thereof, and we shall be furnished with a satisfaction piece at the closing.

C. We have examined the titles to the real estate of your companies, the proceedings taken by your companies for their organization and the issuance of their capital stocks, and are prepared to approve the same, it being understood that you are to use your best efforts to cure insofar as it may be practicable such defects as our investigation has disclosed. Our obligation to close hereunder, however, is subject to our receiving from Messrs. Masten & Nichols, our attorneys of New York City, their favorable opinion as to the sufficiency, legality and regularity of all proceedings of the directors and stockholders of your companies taken for the purpose of carrying out the agreement embodied in this letter and your acceptance thereof, including amongst other things (a) the conveyance to us of the assets and business of your Company and of any subsidiary company, if we request the conveyance to us of all the property and business of any subsidiary company; (b) the proceedings taken for the calling for redemption of the Prior Preference Stock and First Mortgage Bonds of your Company as herein provided.

D. You unconditionally guarantee and agree that all taxes and assessments imposed upon your Company and Clover Ice Cream Company, or upon the income or profits or property thereof by the United States Government or

by the State of Maryland or by any state, municipality or other taxing authority have been fully paid, excepting only current taxes and/or assessments not yet due, and that adequate reserves have been set aside and/or accruals made for all the aforesaid excepted taxes and assessments which have been imposed or assessed prior to January 1, 1929. To the best of your knowledge and belief all such taxes and assessments imposed upon the Horn Ice Cream Company or its predecessors in title and Supreme Ice Cream Company have likewise been paid. There are to your knowledge no unsettled claims in respect to any such taxes and/or assessments and that the Federal income and excess profits tax reports of your companies have been audited and adjusted up to and including the reports filed in respect of the year ended December 31, 1926. You shall, pending the closing of title to us hereunder, furnish to us, our agents and attorneys, all such powers of attorney and authorizations as we shall request to enable us or them to make full inquiry as to the status of all such matters whether before the Income Tax Unit of the United States Treasury Department or any other governmental authority having jurisdiction.

E. You represent and unconditionally guarantee that none of your companies is a party to any contract, oral, written or implied, with any person or party whomsoever, except such as have been or will be made in the regular course of business.

F. You represent and unconditionally guarantee (a) that none of your companies is a party to any suit or other litigation except the usual so-called "accident suits", all of which accident suits are fully covered by insurance and are handled on your behalf by reliable insurance companies, except that no insurance is carried to cover claims arising from the presence of foreign matter in your products, and (b) that neither your Company, Clover Ice Cream Company nor Horn Ice Cream Company has, at the date hereof, or will have at the closing of title to us hereunder any obligation or liability, whether contractual or otherwise, and whether direct or contingent, except such as are shown upon the said balance sheets of said companies, dated December 31, 1928, or are incurred since said date in the usual and regular course of business, or as may be expressly permitted by

the terms of this agreement and that to the best of your knowledge and belief the Supreme Ice Cream Company has not at the date hereof and will not have at the closing of title to us hereunder any obligation or liability, whether contractual or otherwise and whether direct or contingent, except such as are shown upon its said balance sheet of December 31, 1928, or are incurred since said date in the usual and regular course of business, and except money borrowed to retire its Preferred Stock and to satisfy the mortgage upon its properties, and except such as may be expressly permitted by the terms of this agreement.

G. You shall promptly furnish to our attorneys, Messrs. Masten & Nichols, all such certificates of counsel, original and certified copies of corporate proceedings, books and records and such other papers, information and data as they may from time to time reasonably request for the purpose of satisfying themselves as to any of the matters arising under the agreement evidenced by this letter and your acceptance thereof.

H. You shall promptly furnish to us or to such individuals as we may designate such information as we may from time to time reasonably require regarding the property and business of your companies, and will permit us or our said representatives to have all reasonable access to and the right to examine the books, records and accounts and plants and properties thereof.

I. All instruments of transfer and conveyance and all agreements and other papers to be delivered to us pursuant hereto shall be such as are specified by Messrs. Masten & Nichols, shall be such as they shall approve as to form, execution and sufficiency thereof, and the execution and delivery thereof shall be authorized by such proceedings of the directors and stockholders of your respective companies as Messrs. Masten & Nichols may deem necessary. All proceedings of the directors and stockholders of your respective companies in respect of the matters covered by the agreement between us shall be in such manner and form as are approved by Messrs. Masten & Nichols.

J. All buildings, machinery, equipment and other property of your companies are covered by insurance in reliable companies, and in the best judgment of your

Company, in adequate amounts, and you unconditionally guarantee and agree that all fire and other insurance now carried by each of your companies will be maintained by it and continued in full force and effect up to the closing of title to us hereunder.

K. At or before the closing of title to us hereunder you shall deliver to us an agreement executed by Messrs. L. Manuel Hendler and Nathan Lebovitz, in which they shall jointly and severally unconditionally guarantee to us that if within sixty days after the closing of title to us hereunder we shall receive an audit which shall be made at our expense, certified as correct by Messrs. Haskins & Sells, of the condition of the business and property taken over by us from your respective companies at the closing of title to us, and if such audit shall show any deficiency in any of the assets and/or any increase in any of the liabilities shown upon the said balance sheets of your Company and of Clover Ice Cream Company, of December 31, 1928, except such deficiencies of assets or increases of liabilities as are expressly permitted by the terms of the agreement embodied in this letter and your acceptance thereof or which shall have been incurred subsequently to December 31, 1928, in the regular course of business, then the said L. Manuel Hendler and Nathan Lebovitz will forthwith upon demand from us, jointly and severally make good and pay to us in cash the aggregate amount of any and all such deficiencies of assets and/or increase of liabilities; provided, however, that for the purposes of the audit to be made by them, it is understood that Messrs. Haskins & Sells shall not reopen or question the basis of valuation of the several items of assets shown on said balance sheets of your Company and Clover Ice Cream Company of December 31, 1928, and actually owned by said companies on that date.

Said L. Manuel Hendler and Nathan Lebovitz shall further jointly and severally unconditionally agree in and by said agreement that if the said audit of Haskins & Sells shall show any deficiency in any of the assets and/or increase in any of the liabilities of Horn Ice Cream Company and/or Supreme Ice Cream Company as the same existed on the respective dates when your Company acquired the stock of the said Supreme Ice Cream Company and said Horn Ice Cream Company acquired the Balti-

more plant of Southern Dairies, Inc., and such deficiencies of assets or increases of liabilities occurred subsequent to said respective dates and did not occur in the regular course of business and are not expressly permitted by this agreement, or, if the said audit of Messrs. Haskins & Sells shall show any increase in the liabilities of Supreme Ice Cream Company as shown on its said balance sheet of December 31, 1928, not incurred in the regular course of its business and not expressly permitted by this agreement, then the said L. Manuel Hendler and Nathan Lebovitz will forthwith upon demand from us jointly and severally make good and pay to us in cash the aggregate amount of any and all such deficiencies of assets and/or increases of liabilities.

L. At or before the closing of title to us hereunder you shall deliver to us (a) the several agreements of L. Manuel Hendler and Nathan Lebovitz, in which they shall agree that except in the employ of our Company or its subsidiaries they will not, for a period of five years next following the closing of title to us, either directly or indirectly engage in the business of the production, manufacture, distribution and sale of ice cream or other frozen products, or, without our written consent, be interested in or hold in or extend financial aid or assistance to any firm or corporation engaged in such business within the States of Maryland or Delaware, or in any other territory where the business of your Company and its subsidiaries is now being conducted; except that they may purchase for investment, capital stock or obligations of any corporation whose stock is listed on the New York Stock Exchange or any other recognized stock exchange; and (b) the several agreements of L. Manuel Hendler and Nathan Lebovitz, whereby they shall agree that they will forthwith enter and for the period of at least one year from the date of the closing of title to us hereunder continue in the service of our Company and/or of its subsidiaries and will during such term of employment devote their time and attention during all reasonable business hours exclusively to the performance of their duties as officers and/or employees of our Company or one of its subsidiary companies. The amount of cash salary to be specified in the last mentioned employment agreements shall be such as are satisfactory to each of the above named gentlemen, respectively and approved

by our President. The form and substance of the above agreements shall be such as are approved by Messrs. Masten & Nichols.

M. At or prior to the closing of title to us hereunder your Company shall take all such proceedings of its stockholders and directors, or otherwise, and shall file all such certificates and other papers as shall be necessary to change its corporate name to some other corporate name, in which the name "Hendler" shall not appear, and which shall be entirely dissimilar from the name "Hendler Creamery Company, Incorporated", it being the intent and purpose of this provision that, prior to the closing of title to us hereunder, we shall be at liberty to organize, if we see fit, a corporation under the laws of such state as we may desire under the name "Hendler Creamery Company, Incorporated", for the purpose of taking over and carrying on the business now conducted by your Company under the same name which it is now using, and you shall prior to closing of title to us hereunder, should we so request, take all such steps and proceedings as shall be necessary to enable us to organize or to qualify any such new corporation under such name in the State of Delaware, the State of Maryland, and in any other State or States where your Company is now licensed or is transacting business. In the event that we elect to take the property and business of any of the subsidiary companies, such subsidiary company shall also take such steps as we may request in relation to a change of its corporate name.

N. The conveyance of the assets and business to be made by your Company, and by any subsidiary company, if we so request, pursuant hereto shall, in the case of each company, cover and include (without in any way limiting or impairing by specific enumeration the scope, intent or effect of any general description herein contained) all and every the following: (a) all its real estate, leases, leasehold interests, plants, buildings, fixtures, furniture, machinery, tools, appliances, apparatus, equipment, supplies, stock, merchandise (raw, wrought and in process); accounts receivable, bills and notes receivable; (b) all of its business as a going concern, and all the good will and trade name thereof; (c) all of its patents, patent rights, trade-marks, trade names, the right to use

its present corporate name, inventions, labels, brands, copyrights, trade secrets, processes and formulae (duly certified), records and books (excepting its stock and stock transfer books), contracts, contract rights, muni-ments of title, customers' lists, unexpired insurance, insurance awards made or to be made, and prepaid taxes; (d) all shares of stock in subsidiary companies and all other securities owned by it except the stock of any of the three subsidiary companies hereinbefore named whose property and business we may elect to take; (e) all cash in hand and in bank and all other cash assets; (f) all claims against the United States or any State or Municipal Government or any officer, agent or employee thereof, for refund of taxes paid by it, or its predecessors in interest, and your Company, and any subsidiary (if it conveys its property and business to us), shall each agree to execute and deliver to us all such authorizations, powers of attorney, and other papers as shall be necessary to enable us to prosecute and collect upon such claims; and (g) all other rights, claims, demands, assets, property and effects, tangible and intangible, of every kind, nature and description, real, personal and mixed and wheresoever situated, belonging to it or to which it is entitled or in any way connected with the business owned or operated by it. If any of said leases under which your Company or any subsidiary company is tenant require the consent of the landlord to an assignment thereof, you agree that you will, at our request, in respect of any specified lease, use your best endeavors to secure such consent.

FOURTH. We will, prior to closing of title to us hereunder, furnish to you the opinion of Messrs. Masten & Nichols approving of the validity of the corporate organization of our Company and stating that upon the completion of the conveyances to us by your Company hereby called for, and by any subsidiary company if desired by us, the shares of our stock issued and delivered pursuant hereto will have been validly issued and be full paid and non-assessable. The United States Internal Revenue Stamp Tax upon the issuance of the said stock shall be paid by us.

FIFTH. Subject to the performance of the conditions hereinbefore specified, and to the full compliance by you

with all the representations herein set forth, closing of title to us hereunder shall take place, the deeds, assignments and other conveyances and agreements to us shall be delivered by you and the certificates for our stock shall be delivered by us to you and payment of all sums of money payable by us hereunder shall be made, at our office, No. 350 Madison Avenue, New York City, at ten o'clock in the forenoon, on June 21, 1929; provided, however, that either you or our Company may have such adjournment beyond June 21, 1929, as may be reasonably required to permit the completion of the title and other examinations, the taking of the necessary proceedings of stockholders and directors, etc.; and provided, further, that for income tax and accounting purposes the closing hereunder shall be as of the opening of business on April 1, 1929, but this shall not alter in any way the meaning of the term "closing of title to us" so far as concerns any of the agreements and guaranties hereinbefore contained. It being understood that our obligation to close hereunder is conditioned upon your ability to perform your agreements herein contained in respect of each of your companies and we shall not except at our option be obligated to close hereunder in respect of any of your companies unless simultaneously you are prepared to close in respect of all of your said companies.

SIXTH. At the closing of title to us you will deliver or cause to be delivered to us the written resignations of such officers, directors and members of committees of such of your subsidiary companies as we may request, such resignations to be satisfactory in form to us, and, if we so request, will cause to be held, either contemporaneously with the closing of title to us, or thereafter if we prefer, meetings of the Boards of Directors of such of your subsidiary companies as we may request, at which meetings will be accepted such respective resignations as we may desire to have accepted and at which meetings will be elected such respective successors to the persons whose resignations shall be so accepted as we may specify.

SEVENTH. Closing of title to us hereunder having duly taken place pursuant to the foregoing provisions of this letter, you shall thereupon, with all reasonable despatch, cause to be taken such steps as shall be necessary to complete the dissolution of your Company and also of

any subsidiary company whose property and business we may elect to take, and the distribution to the stockholders of your Company entitled thereto of the shares of the capital stock of our Company issued by us pursuant hereto. Said proceedings shall be taken by your attorneys but under the supervision of Messrs. Masten & Nichols.

EIGHTH. The offer hereby made has been duly authorized by our Board of Directors. It is understood that your acceptance hereof shall be duly authorized by suitable proceedings of the directors and stockholders of your Company.

NINTH. Any notice under this agreement shall be deemed to be sufficiently given and served for all purposes if sent by United States registered mail addressed as follows:

Notice to our Company shall be addressed:

Mr. Arthur W. Milburn,
c/o The Borden Company,
350 Madison Avenue,
New York, N. Y.

Notice to you shall be addressed:

Mr. L. Manuel Hendler,
c/o Hendler Creamery Company,
Incorporated,
Baltimore, Maryland.

TENTH. If the foregoing correctly states the understanding between you and us, will you kindly so indicate by signing the acceptance at the foot of the enclosed carbon copy of this letter and returning such accepted copy to us, and thereupon this letter and your said acceptance shall constitute the agreement between us.

THE BORDEN COMPANY.

By G. M. Waugh, Jr.,

Vice-President.

We hereby accept the offer contained in the foregoing letter to us from The Borden Company and agree to per-

form and be bound by the several terms, conditions and provisions thereof.

Dated: May 25th, 1929.

**HENDLER CREAMERY COMPANY,
INCORPORATED.**

By L. Manuel Hendler,
President.

In consideration of the benefits to accrue to us as stockholders of Hendler Creamery Company, Incorporated, the undersigned hereby assent to the foregoing agreement and agree to do and perform, as individuals, all acts and things required of them by the foregoing agreement.

L. Manuel Hendler,

Nathan Lebovitz.

May 25, 1929.

The Borden Company,
350 Madison Ave.,
New York, N. Y.

Dear Sirs:

We are delivering to you herewith a copy of your letter to us dated May 21st, 1929, and which has been formally accepted by our Company as of this date under authority granted by resolutions of the Board of Directors and Stockholders of the Company, certified copies of which have heretofore been furnished your counsel.

In connection with the contract we wish to call your attention specifically to the recital on Page 3 and in other places in your letter where it is stated that there is outstanding \$675,000.00 principal amount of First Mortgage Bonds of our Company. This statement was the correct amount of outstanding bonds at the time when we were first having our negotiations. As shown by your letter, the bonds had the privilege of being converted into Prior Preference Stock of our Company. Between the beginning of our negotiations and May 15th, 1929, on which date our outstanding bonds were called, the bonds had been reduced by conversion to the amount of \$501,000.00. These conversions increased the amount of our outstanding

Prior Preference Stock so that as of this date the amount of our outstanding Prior Preference Stock is the amount shown on Page 2 of your letter, to wit, 14,340 shares of the par value of \$1,434,000.00.

Yours very truly,

HENDLER CREAMERY COMPANY, INC .

L. Manuel Hendler,

President.

LMH/ek''

That said contract was fully performed in accordance with its terms by both parties thereto, and Hendler Creamery Company, Incorporated, was duly liquidated and dissolved. Thereafter the Commissioner of Internal Revenue recognized that a reorganization had been brought about under Section 112 (b)4 of the Revenue Act of 1928, but asserted that the assumption by The Borden Company of the bonded indebtedness of Hendler Creamery Company, Incorporated, as set forth in the contract, constituted "other property" received and not distributed under the plan of reorganization, and hence was taxable under Section 112 (d)2 of the said Revenue Act.

Thereafter, because the said Hendler Creamery Company, Incorporated, had at that time been fully liquidated and dissolved, the Commissioner, purporting to act under Section 311 of the said Revenue Act of 1928, assessed a tax of Fifty-eight Thousand, Seven Hundred Seventy-two Dollars and Seventy-two Cents (\$58,772.72) and interest against the Plaintiff herein as transferee of the said Hendler Creamery Company, Incorporated.

That, on April 15th, 1933, the plaintiff paid to said Galen L. Tait, then Collector of Internal Revenue for the United States of America for the District of Maryland, and now no longer in said office, the sum of Fifty-eight Thousand, Seven Hundred Seventy-two Dollars and Seventy-two Cents (\$58,772.72), and also paid on said date the sum of Ten Thousand Seven Hundred Eighty-one Dollars and Ninety-seven Cents (\$10,781.97), representing interest thereon, or a total of Sixty-nine Thousand, Five Hundred Fifty-four Dollars and Sixty-nine Cents (\$69,554.69), said total sum representing an addi-

tional tax and interest thereon alleged to be due for the calendar year 1929, by Creameries, Inc., a dissolved corporation, and assessed against plaintiff as one of the alleged transferees of the assets of said corporation.

That plaintiff, on August 30, 1933, filed a claim for refund in the total amount of the aforesaid sum and interest thereon assessed and paid, setting forth in said claim for refund and brief filed in support thereof that said claim for refund should be allowed for the following reasons:

(1) The deficiency in tax and interest thereon for which this claim for refund is filed arises out of an alleged liability of the Taxpayer, L. Manuel Hendler, under Section 311 of the Revenue Act of 1928, as a transferee of the assets of Creameries, Incorporated, (formerly Hendler Creamery Company, Incorporated), 1100 E. Baltimore Street, Baltimore, Maryland, for an alleged deficiency in tax due from Creameries, Incorporated, for the year 1929, as disclosed in a letter from the Commissioner of Internal Revenue addressed to the Taxpayer, dated February 3, 1933.

(2) The above deficiency assessed against the Taxpayer herein and paid by him on April 15th, 1933, was based upon the determination and adjustments made therein, contained in a letter from the Commissioner and transmitted to Creameries, Incorporated, dated June 4th, 1932, which said determination and adjustments includes the sum of \$534,297.50 as income for the year 1929 of Creameries, Incorporated. The alleged income of Creameries, Incorporated, for the year 1929 of \$534,297.50 represents the cash equivalent of the bonded indebtedness of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) assumed by The Borden Company under the terms and provisions of a contract of reorganization between said Company and Hendler Creamery Company, Incorporated, and asserted to have been received by Creameries, Incorporated, as "other property" in pursuance of a plan of reorganization, resulting in an alleged taxable gain under Section 112 of the Revenue Act of 1928.

(3) The Taxpayer as transferee of the assets of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) denies any liability under Section 311 of

the Revenue Act of 1928, arising out of the aforesaid alleged taxable gain recognized in accordance with Section 112 (d), (2) of the Revenue Act of 1928 and asserted to be due by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) because the inclusion in its income for the year 1929 of the cash equivalent of the bonded indebtedness of said corporation was erroneous.

(4) Under the terms and provisions of the aforesaid contract between The Borden Company and Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) which provided for a plan of reorganization, all that Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) actually received or was entitled to receive for its assets and for the assumption of its bonded indebtedness by The Borden Company was stock of The Borden Company and cash for the redemption of its prior preference stock, which said cash was distributed in pursuance of the aforesaid plan of reorganization.

All that Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) had to transfer was its net asset value and all it got for that net asset value was stock in The Borden Company and cash which was distributed to Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) stockholders in pursuance of the plan of reorganization.

(5) The transaction was an exchange of property, in pursuance of a plan of reorganization, by a corporation, a party to the reorganization, solely for stock in another corporation a party to the reorganization and for money distributed in pursuance of the plan of reorganization.

It is, therefore, respectfully submitted, that the transaction upon which the alleged deficiency is asserted, resulted in no taxable gain under Section 112 (b), (4) and (d), (1) of the Revenue Act of 1928, notwithstanding the assumption of the aforesaid bonded indebtedness and the assessment of the aforesaid tax plus interest thereon against the taxpayer, as transferee, was erroneous and the within claim for refund should be allowed in full.

(6) Otherwise stated the Commissioner is in error in considering the bonded indebtedness assumed by The Borden Company in a reorganization under Section 112

of the Revenue Act of 1928 as "other property" received by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) and not distributed in pursuance of the plan of reorganization.

The taxpayer is not liable as an alleged transferee for deficiency assessed against Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) because the stockholders of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) were entitled to, and did, receive the stock of The Borden Company prior to the redemption date of the bonds.

Transferee liability is a remedy that is not available to a creditor whose remedy has arisen after the transfer has been made.

If the cash equivalent of the bonded indebtedness constituted "other property" received by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) then at the time it was constructively received and the alleged tax accrued, the stockholders of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) had already received the stock of The Borden Company and were, therefore, not subject to any transferee liability.

That a hearing was held on said claim for refund by the Commissioner of Internal Revenue and subsequently, to wit, under date of March 26th, 1934, plaintiff was advised in writing by the Commissioner of Internal Revenue that his aforesaid claim for refund would be disallowed and that official notice of the disallowance of said claim would be issued by registered mail in accordance with Section 1103 (a) of the Revenue Act of 1932. Thereafter, under date of April 6, 1934, plaintiff received by registered mail the aforesaid formal notice of disallowance of his said claim for refund in accordance with the aforesaid provisions of said Section 1103 (a) of the Revenue Act of 1932.

No part of said sum of Sixty-nine Thousand Five Hundred Fifty-four Dollars and Sixty-nine Cents (\$69,554.69) has been repaid to the plaintiff and the sum total thereof, with interest from April 15th, 1933, remains due and owing from the plaintiff to the defendant.

That this suit was not filed prior to the disallowance by the Commissioner of Internal Revenue of plaintiff's aforesaid claim for refund and further, that said suit was filed within two years from the date of disallowance of said claim for refund.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of Sixty-nine Thousand Five Hundred Fifty-four Dollars and Sixty-nine Cents (\$69,554.69), with interest thereon from April 15th, 1933.

JOS. ADDISON,

WM. R. SEMANS,

BARTON, WILMER, AMBLER & BARTON,

Attorneys for Plaintiff.

TO THE DEFENDANT—United States of America:

TAKE NOTICE—That on the day of your appearance to this action in the United States District Court for the District of Maryland, you will be required to plead to said declaration in accordance with the rules of said Court, or judgment by default will be entered against you.

JOS. ADDISON,

WM. R. SEMANS,

BARTON, WILMER, AMBLER & BARTON,

Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND,
CITY OF BALTIMORE

} ss:

L. MANUEL HENDLER, being duly sworn, deposes and says that he is the plaintiff named in a cause of action filed in the District Court of the United States, for the District of Maryland, on July 11, 1934, entitled "L. Manuel Hendler, as Transferee of Creameries, Inc., (formerly Hendler Creamery Company, Incorporated), Plaintiff vs. United States of America, Defendant—In the United States District Court for the District of Maryland, At Law, No. 5419"; that he has read the contents

of said cause of action and that the matters and things therein contained are true in substance and fact.

L. MANUEL HENDLER.

Sworn to and subscribed before
me this 4th day of December,
1936.

(Seal) HAROLD LEVIN,

Notary Public.

(My Commission expires May 3, 1937.)

PLEAS.

Filed 18th December, 1934.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of
Creameries, Inc. (formerly Hendler
Creamery Company, Incorporated),
Plaintiff,

vs.

United States of America,
Defendant.

Law No. 5419

The United States of America, defendant in the above entitled case, by Bernard J. Flynn, United States Attorney in and for the District of Maryland, for pleas to the declaration heretofore filed, and each and every count thereof, says:

1. That it never promised as alleged.
2. That it was never indebted as alleged.

BERNARD FLYNN,

United States Attorney.

DOCKET ENTRY.

December 18, 1934—Issues Joined.

VERDICT.

Filed 7th January, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.L. Manuel Hendler, as Transferee of
Creameries, Inc. (formerly Hendler
Creamery Co., Inc.)

Plaintiff,

vs.

United States of America,

Defendant.

At Law No. 5419

Verdict for the plaintiff in the sum of Sixty-two Thousand, One Hundred Forty-five Dollars and Eighty-nine cents (\$62,145.89), together with interest thereon from April 15, 1933, according to law.

W. CALVIN CHESNUT,

United States District Judge.

January 7, 1937.

DOCKET ENTRY OF JUDGMENT.

January 11, 1937—Judgment on Verdict absolute in favor of the plaintiff in the sum of \$62,145.89 together with interest thereon from April 15, 1933, according to law.

**ORDER OF COURT EXTENDING TIME FOR FILING
BILL OF EXCEPTIONS.**

Filed 15th February, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of
Creameries, Inc. (formerly Hendler
Creamery Co., Inc.)

Plaintiff,

vs.

At Law No. 5419

United States of America,

Defendant.

Upon the foregoing petition, it is, this 15th day of February, 1937, by the United States District Court in and for the District of Maryland, ORDERED, that the time for filing a bill of exceptions in the aforementioned case be, and the same is hereby extended for forty days from the 20th day of February, 1937.

W. CALVIN CHESNUT,
United States District Judge.

**ORDER OF COURT EXTENDING TIME FOR FILING
BILL OF EXCEPTIONS.**

Filed 25th March, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of
Creameries, Inc. (formerly Hendler
Creamery Co., Inc.)

Plaintiff,

vs.

At Law No. 5419

United States of America,

Defendant.

Upon the foregoing petition, it is, this 25th day of March, 1937, by the United States District Court in and

for the District of Maryland, ORDERED, that the time for filing a bill of exceptions in the aforementioned case be, and the same is hereby extended for thirty days from the 1st day of April, 1937.

W. CALVIN CHESNUT,

United States District Judge.

BILL OF EXCEPTIONS.

Filed 30th April, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of
Creameries, Inc. (formerly Hendler
Creamery Co., Inc.)

Plaintiff,

vs.

United States of America,

Defendant.

At Law No. 5419

Be it remembered that at the trial of this cause in the December Term, 1936, of this Court, the Honorable W. Calvin Chesnut presiding, the following proceedings were had, to wit:

The plaintiff, to sustain the issues on his part, introduced a stipulation of facts, together with exhibits attached thereto and forming a part thereof, said exhibits being designated A, B, C-1, C-2, D-1, D-2, E, F, G, H, H-1, I, J, K, L, M, N, O, P, Q, R, S, T and U. Said stipulation, together with exhibits, was received by the Court and is set forth herein, insofar as relevant to this appeal, in haec verba as follows:

STIPULATION OF FACTS.

Filed 3rd December, 1936.

(Style of Court and Title Omitted)

It is stipulated and agreed by and between counsel for plaintiff and defendant that the following facts shall be accepted as true:

The Hendler Creamery Company, Incorporated, was, on and prior to May 21, 1929, a corporation of the State of Maryland. The corporate name of said corporation was subsequently changed to "Creameries, Incorporated" by amendment to its Charter, which said amendment was duly authorized by proper resolutions of the Board of Directors and Stockholders of the Company on May 21, 1929.

The Borden Company was, on and prior to May 21, 1929, a corporation of the State of New Jersey.

Prior to May 21, 1929, the Borden Company and Hendler Creamery Company, Incorporated, entered into negotiations in contemplation of effecting a conveyance of its entire assets and business to the Borden Company.

On May 21, 1929, an agreement, attached hereto and incorporated herein by reference, being marked "Exhibit A" for identification, was submitted to the stockholders and directors of Hendler Creamery Company, Incorporated.

Said agreement was duly approved and adopted at special meetings of the stockholders and directors of Hendler Creamery Company, Incorporated, held May 21, 1929. The minutes of said meetings are attached hereto and incorporated herein by reference, being marked "Exhibit B" for identification.

Under the terms of the agreement among other things Hendler Creamery Company, Incorporated, was required to provide for the calling for redemption of its outstanding First Mortgage six per cent Convertible Gold Bonds and Prior Preference Stock as of July 1, 1929, by resolutions to be adopted not later than May 21, 1929. The necessary resolutions were duly passed and are attached hereto and incorporated herein by reference, being marked "Exhibit C-1" and "Exhibit C-2".

The notices of redemption of said Bonds and Prior Preference Stock are in the form attached hereto and incorporated herein by reference, being marked "Exhibit D-1" and "Exhibit D-2".

The Borden Company, by resolution adopted May 15, 1929, authorized its officers to execute and perform its obligations under the agreement with the Hendler Creamery Company, Incorporated, which resolution is attached hereto and incorporated herein by reference, being marked "Exhibit E".

Hendler Creamery Company, Incorporated, voted on May 21, 1929, to change its name to "Creameries, Incorporated" by amendment to its Charter. On June 25, 1929, the name of the Company was changed to Creameries, Incorporated.

On June 21, 1929, Hendler Creamery Company, Incorporated, complying with the agreement of May 21, 1929, conveyed or caused to be conveyed all of its assets and those of its subsidiaries to The Borden Company, receiving under said agreement 105,306 shares of the Common Stock of The Borden Company and \$43,421.87 in cash, which stock and cash were distributed to the Stockholders of Hendler Creamery Company, Incorporated, in accordance with the plan set out in said agreement of May 21, 1929.

Pursuant to its agreement with Hendler Creamery Company, Incorporated, the Borden Company paid to the Commonwealth Bank, Baltimore, Maryland, the sum of \$381,225.00 by its check dated June 27, 1929, to be used in retiring the First Mortgage Gold Bonds of said Hendler Creamery Company, Incorporated, and on the same date authorized said Commonwealth Bank to cancel \$149,000.00 of face value of said bonds owned by it and its subsidiaries. The letter of June 27, 1929, is attached hereto and incorporated herein by reference being marked "Exhibit F".

An examination of the 1929 income tax return of Creameries, Incorporated, was made and a report thereof made by the Internal Revenue Agent in Charge (Baltimore, Maryland) dated March 31, 1931, proposing an additional tax in excess of the amount shown by said return in the amount of \$11,852.09. The pertinent parts

are attached hereto and incorporated herein by reference, being marked "Exhibit G".

A protest, dated June 8, 1931, against the findings in said report, was executed by Creameries, Incorporated, and filed.

Among the items disputed in said protest were—

1. Unamortized discount on Bonds retired for cash..... \$30,342.61
2. Premiums on Bonds retired for cash. 26,569.40

Said protest is attached thereto and incorporated herein by reference, being marked "Exhibit H".

On November 23, 1931, a supplemental report for the year 1929 was made by the Internal Revenue Agent in Charge (Baltimore, Maryland), in which the foregoing unamortized discount and premiums on Bonds were recommended for allowance and the proposed additional tax was reduced to \$5,591.76, which was duly assessed and paid. The said supplemental report is attached hereto and incorporated herein by reference, being marked "Exhibit H-1."

By a letter dated June 4, 1932, the Commissioner of Internal Revenue further revised the tax liability of Creameries, Incorporated, for the year 1929, asserting a deficiency in the amount of \$58,772.72, as is more fully set forth in said letter, which is attached hereto and incorporated herein by reference, being marked "Exhibit I".

On August 17, 1932, Creameries, Incorporated, received a Notice and Demand for said additional tax. Said notice and demand are attached hereto and incorporated herein by reference, being marked "Exhibit J".

On August 22nd, 1932, the above bill was returned to the Collector of Internal Revenue with a letter which is attached hereto and incorporated herein by reference, being marked "Exhibit K".

Under date of August 29, 1932, L. Manuel Handler and other stockholders of Creameries, Incorporated, received a letter asserting liability for said additional tax against

them as transferees of Creameries, Incorporated, which letter is attached hereto and incorporated herein by reference, being marked "Exhibit L".

By agreement between the Commissioner of Internal Revenue and L. Manuel Hendler, on January 9, 1933, the entire tax liability was asserted against L. Manuel Hendler as the principal stockholder.

On October 27, 1932, a protest was duly filed to said Commissioner's letter of August 29, 1932.

Under date of February 3, 1933, L. Manuel Hendler was advised that his protest was denied, which advice is attached hereto and incorporated herein by reference, being marked "Exhibit M".

On April 15, 1933, L. Manuel Hendler paid to Galen L. Tait, then Collector of Internal Revenue for the United States for the District of Maryland, the aforesaid additional tax liability of..... \$58,772.72

and interest thereon of..... 10,781.97

or a total of..... \$69,554.69

On August 30, 1933, L. Manuel Hendler filed a claim for refund, which claim is attached hereto and incorporated herein by reference, being marked "Exhibit N".

Under date of December 2, 1933, L. Manuel Hendler was advised that his aforesaid claim for refund was disallowed tentatively, which advice is attached hereto and incorporated herein by reference, being marked "Exhibit O".

Under date of March 26, 1934, L. Manuel Hendler was advised that his aforesaid claim for refund was disallowed, which advice is attached hereto and incorporated herein by reference, being marked "Exhibit P".

On April 6, 1934, the claim was rejected in a schedule approved by the Commissioner, as set forth in the Commissioner's letter dated April 6, 1934, copy of which is attached hereto and incorporated herein by reference, being marked "Exhibit Q".

On March 6, 1930, Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), filed a ten-

tative income tax return for the calendar year 1929, with accompanying schedules. On June 6, 1930, Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), filed a final income tax return for the calendar year 1929, together with accompanying schedules, certified copies of which are attached hereto and incorporated herein by reference, being marked "Exhibit R".

On June 17, 1929, a special meeting of the Board of Directors of the Hendler Creamery Company, Incorporated, was held relative to the distribution of The Borden Company stock to the Hendler Creamery Company, Incorporated, stockholders. The minutes of said meeting are attached hereto and incorporated herein by reference, being marked "Exhibit S".

On September 30, 1931, a Consent Waiver on Form No. 870, was executed by Creameries, Incorporated, by which it agreed to immediate assessment of a deficiency in tax against the corporation for the calendar year 1929. Copy of said Consent Waiver is attached hereto and incorporated herein by reference, being marked "Exhibit T".

On April 16, 1929, a preliminary agreement was entered into between The Borden Company and L. Manuel Hendler and Nathan Lebovitz, then owners of more than ninety per cent (90%) of the outstanding common and preferred stock of Hendler Creamery Company, Incorporated, and then controlling more than twenty per cent (20%) of the outstanding Prior Preference Stock of said Company. Said agreement is attached hereto and incorporated herein by reference, being marked "Exhibit U".

On July 10, 1929, the first mortgage of Hendler Creamery Company, Incorporated, was released.

On August 5, 1930, Creameries, Incorporated, was dissolved.

On June 21, 1929, there was outstanding three million, two hundred fifty-six thousand, nine hundred ninety-three (3,256,993) shares of the Capital Stock of The Borden Company, which number of shares outstanding included

one hundred five thousand, three hundred six (105,306) shares of The Borden Company stock distributed to stockholders of the Hender Creamery Company, Incorporated.

On June 21, 1929, the market value of The Borden Company stock on the New York Stock Exchange was \$89-15/16 per share. This value represented the mean between the high and low sales on that date.

The amount of the reduction in the income tax liability of Creameries, Incorporated, for the calendar year 1929, due to the Commissioner's allowance of unamortized discount on the First Mortgage 6% Convertible 20-Year Gold Bonds, and to the allowance of the premium paid upon said bonds at retirement thereof was \$6,260.33, the difference between the proposed deficiency of \$11,852.09 as shown in Revenue Agent Bauer's report dated March 31, 1931, and the deficiency of \$5,591.76 actually assessed as shown in Revenue Agent Bauer's second report dated September 25, 1931.

It is further agreed that either party to the cause may adduce additional evidence.

WILLIAM R. SEMANS,
JOSEPH ADDISON,
RANDOLPH BARTON, JR.,
BARTON, WILMER, BRAMBLE,
ADDISON & SEMANS,
Attorneys for Plaintiff.

BERNARD J. FLYNN,
United States Attorney.
Attorney for Defendant.

INDEX TO EXHIBITS.

- Agreement between The Borden Company and Hendler Creamery Company, Incorporated, dated May 21, 1929, Exhibit A
- Minutes of special meetings of the Stockholders and Directors of Hendler Creamery Company, Incorporated, approving and adopting agreement between The Borden Company and Hendler Creamery Company, Incorporated, Exhibit B
- Resolutions of the Hendler Creamery Company calling for redemption First Mortgage 6% Convertible Gold Bonds, Exhibit C-1
- Resolutions of the Hendler Creamery Company calling for redemption Prior Preference stock, Exhibit C-2
- Notice of redemption to Trustee of First Mortgage 6% Convertible Gold Bonds of Hendler Creamery Company, Incorporated, Exhibit D-1
- Notice of redemption to Trustee of Prior Preference Stock of Hendler Creamery Company, Incorporated Exhibit D-2
- Proceedings of the Directors of The Borden Company adopting resolution authorizing its officers to execute the agreement with Hendler Creamery Company, Incorporated, Exhibit E
- Letter dated June 27, 1929, from The Borden Company to the Commonwealth Bank giving instructions and enclosing check for retirement of the First Mortgage Gold Bonds of Hendler Creamery Company, Incorporated, Exhibit F

- Report of the Internal Revenue Agent in Charge (Baltimore, Maryland) dated March 31, 1931, covering examination of 1929 Income Tax Return of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), proposing additional tax in the amount of \$11,852.09, Exhibit G
- Protest dated June 8, 1931, to the report of the Internal Revenue Agent in Charge dated March 31, 1931, filed by Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), Exhibit H
- Supplemental report of the Internal Revenue Agent in Charge dated November 23, 1931, of the 1929 income tax return of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), Exhibit H-1
- Letter of the Commissioner of Internal Revenue dated June 4, 1932, revising the tax liability of Creameries, Incorporated, for the year 1929, asserting a deficiency in the amount of \$58,772.72, Exhibit I
- Notice and demand for additional tax of \$58,772.72 against Creameries, Incorporated, received August 17, 1932, Exhibit J
- Letter from counsel of former Stockholders and Officers of Creameries, Incorporated, to Collector of Internal Revenue re dissolution of Creameries, Incorporated, Exhibit K
- Letter from Commissioner of Internal Revenue to L. Manuel Hendler, et al., Stockholders of Creameries, Incorporated, asserting liability for additional tax as transferees of Creameries, Incorporated, Exhibit L

Letter from Commissioner of Internal Revenue to L. Manuel Hendler dated February 3, 1935, advising that the protest filed by L. Manuel Hendler was denied,

Exhibit M

Claim for refund filed by L. Manuel Hendler filed August 30, 1933,

Exhibit N

Tentative notice of disallowance of claim for refund filed by L. Manuel Hendler, dated December 2, 1933,

Exhibit O

Further notice of disallowance of claim for refund filed by L. Manuel Hendler, dated March 26, 1934,

Exhibit P

Official notice of rejection of claim for refund filed by L. Manuel Hendler dated April 6, 1934,

Exhibit Q

Certified copies of tentative and final income tax returns of Creameries, Incorporated (formerly Hendler Creamery, Incorporated), for calendar year 1929, filed March 6, 1930 and June 6, 1930, respectively,

Exhibit R

Minutes of Special Meeting of Board of Directors of Hendler Creamery Company, Incorporated, held June 17, 1929,

Exhibit S

Consent Waiver, Form No. 870, executed by Creameries, Incorporated, agreeing to immediate assessment of deficiency tax for calendar year 1929,

Exhibit T

Agreement between The Borden Company and L. Manuel Hendler and Nathan Lebovitz, dated April 16, 1929,

Exhibit U

EXHIBIT "B"

Minutes of Special Meetings of the Stockholders and Directors of Hendler Creamery Company, Incorporated, approving and adopting agreement between The Borden Company and Hendler Creamery Company, Incorporated.

**HENDLER CREAMERY COMPANY,
INCORPORATED.**

**MINUTES OF A SPECIAL MEETING OF THE
BOARD OF DIRECTORS.**

Minutes of a Special Meeting of the Board of Directors of HENDLER CREAMERY COMPANY, INCORPORATED, a corporation of the State of Maryland, duly held at the principal office of said Company at Baltimore, Maryland, on May 21, 1929, at two o'clock in the afternoon, pursuant to waiver of notice.

The following named Directors were present:

Messrs.—Deupert,
L. M. Hendler,
B. B. Hendler,
Cover,
Brawner and
Lebovitz

constituting a majority of the Board and a quorum.

The President of the Company, L. Manuel Hendler, called the meeting to order and presided throughout. The Secretary of the Company, Nathan Lebovitz, acted as Secretary of the meeting.

The Secretary presented a waiver of notice and consent signed by all of the directors fixing the time and place of the meeting and the business to be transacted thereat. On motion, duly made and seconded, the said waiver and consent was ordered filed with the minutes of this meeting.

The President then stated that the meeting had been called for the purpose, amongst others, of considering the advisability of effecting a reorganization of the Com-

pany, and, pursuant to such plan of reorganization, conveying its entire assets and business to The Borden Company, a corporation of the State of New Jersey. The President presented to the Board a form of contract between The Borden Company and Hendler Creamery Company, Incorporated, which contract provides that a reorganization of Hendler Creamery Company, Incorporated shall be effected and that, pursuant to the plan of reorganization therein set forth, Hendler Creamery Company, Incorporated, shall convey, assign and transfer its entire property and assets, tangible and intangible of every kind and description and wheresoever situated, as well as its business as a going concern, its trade name (including the exclusive right to do business under the name "Hendler Creamery Company, Incorporated"), trademarks, patents, patent rights and good will, the said property and assets to include the entire issued and outstanding capital stock of each of its subsidiary companies, or should The Borden Company so request, in lieu of the stock thereof, the entire property, assets, trade name (including the exclusive right to do business under the corporate name of such subsidiary company), trademarks, patents, patent rights, business and good will of each or any of said subsidiary companies. In exchange therefor The Borden Company will:

(1) Issue and deliver to the Company, or upon its order, certificates for 86,716 shares of the full paid and non-assessable capital stock of The Borden Company of the par value of \$25 per share and the aggregate par value of \$2,167,900 of the same character and tenor as the stock of The Borden Company now listed on the New York Stock Exchange and constituting part of the authorized capital stock of The Borden Company.

(2) Assume and agree to pay all indebtedness and liabilities whatsoever of this Company and of each subsidiary thereof that may convey its assets and business to The Borden Company except (a) liability for capital stock, (b) certain tax liabilities as set forth in said contract and (c) legal fees of counsel for this Company and its subsidiaries in connection with the said contract with The Borden Company and the transfer thereby required and the fees and expenses of the liquidating or redemption agent for the Prior Preference Stock of this Company.

(3) Provide for the liquidation of the shares of Prior Preference Stock of Hendler Creamery Company, Incorporated, now outstanding at the option of the holders thereof, either (a) by payment of the sum of \$107.50 per share plus an amount equal to the accrued and unpaid dividends thereon at the rate of \$7 per share per annum accumulated to the date of closing of title to The Borden Company or, if the certificates therefor are surrendered after the closing of title, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, the date on which such Prior Preference Stock is to be redeemed as hereinafter provided, or (b) by the issuance of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of \$25 per share in exchange for every three shares of the Prior Preference Stock of this Company.

The President stated that by the terms of said agreement it was understood and agreed that all outstanding First Mortgage 6% Convertible Gold Bonds and all Prior Preference Stock of this Company, shall be called for redemption on July 1, 1929, and that proper resolutions calling said bonds for redemption shall be adopted not later than May 21, 1929.

It was ordered that a copy of said agreement be identified by the Secretary and filed with and as a part of the minutes of this meeting.

General discussion then ensued.

On motion, duly made and seconded, and by the unanimous vote of all the directors present, constituting a majority of the Board of Directors and a quorum, the following resolutions and preambles were unanimously adopted:

WHEREAS, the President has submitted to the Board of Directors of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland, a form of contract proposed to be entered into between The Borden Company and this Company whereby it is provided that this Company shall, pursuant to a plan of reorganization in said contract set forth, convey, assign and transfer its entire property and assets, tangible and intangible of every kind and

description and wheresoever situated, as well as its business as a going concern, its trade name (including the exclusive right to do business under the name "Hendler Creamery Company, Incorporated"), trademarks, patents, patent rights and good will. The said property and assets are to include the entire issued and outstanding capital stock of each of its subsidiary companies, but should The Borden Company so request, it shall in lieu of conveying to The Borden Company the said stock, cause each of the said subsidiary companies, or such one or more of them as The Borden Company may request, to transfer and convey to The Borden Company its entire property and assets, tangible and intangible, of every kind and description and wheresoever situated, as well as its business as a going concern, its trade name (including the exclusive right to do business under the corporate name of such subsidiary company), trademarks, patents and patent rights and good will. In exchange therefor The Borden Company will (1) issue and deliver to this Company, or upon its order, certificates for 86,716 shares of the full paid and non-assessable capital stock of The Borden Company of the par value of \$25 per share and the aggregate par value of \$2,167,900 of the same character and tenor as the stock of The Borden Company now listed on the New York Stock Exchange and constituting part of the authorized capital stock of The Borden Company; and (2) assume and agree to pay all indebtedness and liabilities whatsoever of this Company, and of each subsidiary thereof that may convey its assets and business to The Borden Company, as the same shall exist at the closing of title to The Borden Company except (a) liability for capital stock, (b) any income or excess profits taxes incurred by this Company or by either or any of its said subsidiary companies by reason of the conveyance of its assets and business to The Borden Company and (c) any tax incurred by this Company or by any subsidiary company whose property and business The Borden Company may elect to take in respect of business transacted by this Company or by any such subsidiary company subsequent to the closing of title to The Borden Company and (d) any ad-

ditional income and/or excess profits taxes now or heretofore imposed upon this Company or upon any subsidiary company in respect of business transacted and/or income accrued prior to January 1, 1929 and (e) legal fees of counsel for this Company and its subsidiaries in connection with the said contract with The Borden Company and the transfer thereby required and the fees and expenses of the liquidating or redemption agent for the Prior Preference Stock of this Company; and (3) provide for the liquidation of the 14,340 shares of Prior Preference Stock of this Company now outstanding, at the option of the holders thereof, either (a) by payment of the sum of \$107.50 per share plus an amount equal to the accrued and unpaid dividends thereon at the rate of \$7 per share per annum accumulated to the date of closing of title to The Borden Company or, if the certificates therefor are surrendered after the closing of title, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, the date on which such Prior Preference Stock is to be redeemed as hereinafter provided, or (b) by the issuance of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of \$25 per share in exchange for every three shares of the Prior Preference Stock of this Company; and

WHEREAS, the members of this Board of Directors have inquired into and are familiar with the standing, property and business of The Borden Company. On April 24, 1929, the par value of the shares of The Borden Company were reduced from \$50 per share to \$25 per share, each stockholder receiving two shares of the new \$25 par stock for each share of the old \$50 par stock. During the first four months of the year 1929 The Borden Company shares of stock of the par value of Fifty Dollars (\$50) each have sold in the open market at prices ranging from Two Hundred Three Dollars and Seventy-five cents (\$203.75) per share to One Hundred Seventy-four Dollars and Fifty cents (\$174.50) per share. In the judgment of this Board, at a conservative valuation,

the shares of stock of The Borden Company that will be received by this Company are adequate consideration for the assets and businesses to be conveyed to The Borden Company in return therefor. Now, therefore, be it

RESOLVED, (1) That the Board of Directors of Hendler Creamery Company, Incorporated, do hereby declare that, in their opinion, the contract proposed to be entered into, between The Borden Company and this Company, whereby it is provided that this Company, pursuant to a plan of reorganization, convey to the Borden Company all of its property, assets, business, trade name and good will including the entire capital stock of its subsidiary companies, or, in lieu of the stock of any subsidiary, the business and assets thereof, upon the terms and conditions in said agreement set forth, is fair and reasonable, and that this Board of Directors deem it expedient and to the best interests of this Company and its stockholders to enter into a contract substantially in the form presented to this meeting.

(2) That subject to the approval of the Common and Preferred stockholders of the Company (the Prior Preference Stock being called for redemption as hereinafter provided), the Board of Directors of Hendler Creamery Company, Incorporated do hereby approve that this Company enter into a contract substantially in the form presented to this meeting, and the President of this Company be, and he hereby is, authorized and instructed to execute for and in behalf of this Company a contract substantially in the form presented to this meeting with such changes in the provisions of said contract as the President may deem to be proper and for the best interests of this Company, and he hereby is authorized and instructed, in the name and on behalf of this Company, to deliver such contract to The Borden Company.

(3) That a special meeting of the Common and Preferred stockholders of this Company be, and it hereby is, called to consider and take action upon the conveyance of the said property, assets, business,

trade name and good will of this Company, to The Borden Company. That such meeting of the stockholders be held at the principal office of the Company in Baltimore, Maryland, on May 21st, 1929, at 2:30 o'clock in the afternoon, and that the Secretary be, and he hereby is, instructed to give due notice of such meeting to the holders of the Common and Preferred stock of this Company.

(4) That upon the holders of the Common and Preferred Stock of the Company at such special meeting consenting to the conveyance of the business, assets, property, trade name and good will of this Company to The Borden Company, this Board hereby declares it advisable to change the corporate name from Hendler Creamery Company, Incorporated to

CREAMERIES, INC.

and to amend the charter of the Company by striking out Article Second of the Charter of the Company, and inserting in lieu thereof the following: "Second: The name of the Corporation (which is hereinafter called "corporation") is:

CREAMERIES, INC.

That a special meeting of the Common and Preferred stockholders of the Company be, and it hereby is, called to consider and take action upon the adoption of the amendment advised as aforesaid, and that such meeting be held at the principal office of the Company at Baltimore, Maryland, on May 21, 1929, at 2:30 o'clock in the afternoon, and that the Secretary be, and he hereby is, instructed to give due notice of such meeting to the holders of the Common and Preferred stock of this Company issued and outstanding. That upon the consent of the holders of the Common and Preferred stock of the Company given at such meeting, the President and Secretary shall make, acknowledge and file all such certificates of change in the corporate name as shall be required to make such change effective, in accordance with the laws of the State of Maryland.

(5) That upon the holders of the Common and Preferred stock, at the meeting held for the purpose, consenting to the conveyance of this Company's property, assets, business, trade name and good will to The Borden Company, the President or Vice-President and the Secretary or Assistant Secretary, as well as all other executive officers of this Company be, and they hereby are, authorized and instructed in the name and on behalf of this Company to execute, acknowledge and deliver to The Borden Company, or to its nominee, all such deeds, bills of sale, assignments and other conveyances and papers and documents as it shall be necessary for this Company to execute and deliver in order to transfer its property, assets, business, trade name and good will to The Borden Company and to vest title thereto in The Borden Company; and that the Executive officers of this Company be, and they hereby are, authorized and instructed to take any and all further steps and proceedings and to do all such further things as, in their judgment, shall be requisite and necessary to carry out the said conveyance of the property, assets, business, trade name and good will of this Company to The Borden Company.

(6) That upon the holders of the Common and Preferred stock, at the meeting held for the purpose, consenting to the conveyance of this Company's property, assets, business, trade name and good will to The Borden Company, this Board of Directors hereby declares it advisable and most for the benefit of Hendler Creamery Company, Incorporated, that said Company be dissolved thereafter as soon as may be practicable. That a special meeting of the holders of the Common and Preferred stock of this Company be called to consider and take action upon the dissolution of this Company and that such meeting be held at the principal office of the Company at Baltimore, Maryland, on May 21, 1929, at 2:30 o'clock in the afternoon, and that the Secretary be, and he hereby is, instructed to give due notice of such meeting to all the holders of the Common and Preferred stock of this Company issued and outstanding. That upon the consent of such stockholders given at such meeting, the President and the

Secretary shall make, acknowledge and file all such petitions for the dissolution of this Company, and the officers of this Company shall take all such steps, as shall be required to make such dissolution effective, in accordance with the laws of the State of Maryland.

(7) That upon the holders of the Common and Preferred stock at the meeting held for the purpose consenting to the conveyance of the business, assets, property, trade name and good will of this Company to The Borden Company, and in the event that The Borden Company should desire the conveyance to it of the business and assets of Supreme Ice Cream Company, Horn Ice Cream Company and Clover Ice Cream Company, or either or any of the said corporations, in lieu of the capital stock thereof, the President of this Company be and he hereby is authorized and instructed to vote the capital stock of such corporations held by this Company in favor of the conveyance of their respective businesses and assets to The Borden Company, a change of their respective corporate names and dissolution, and/or execute for and on behalf of this Company a consent or consents thereto, and to do any and all further acts and things for and on behalf of this Company as a stockholder of such corporations as may be necessary to comply with the provisions of the contract to be entered into between this Company and The Borden Company that relate to such corporations.

After discussion and on motion duly made and unanimously carried it was

RESOLVED, that upon the Common and Preferred stockholders at the special meeting held for that purpose, consenting to the conveyance of the business, assets, property, trade name and good will of this Company to The Borden Company, provision be made for the liquidation of all of the Prior Preference Stock of this Company in accordance with the plan of reorganization set forth in the said proposed contract with The Borden Company, either (1) by payment to the holders thereof of the redemption price, to wit, \$107.50 per share and ac-

crued dividends thereon accumulated to the closing of title to The Borden Company, or, if the certificates therefor are surrendered after the closing, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, or (2) at the option of the holders of such Prior Preference Stock by the delivery of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of \$25 per share for each three shares of the Prior Preference Stock of this Company.

The President then submitted to the meeting a form of offer to the holders of the Prior Preference Stock of the Company to be mailed in accordance with the foregoing resolution and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that the form of offer presented to this meeting be and it hereby is approved and adopted, and the proper officers of this Company be and they hereby are authorized and instructed to mail a copy of such notice to each holder of Prior Preference Stock of record at the close of business on May 21st, 1929.

RESOLVED FURTHER, that Commonwealth Bank of Baltimore be and it hereby is appointed agent and depository of this Company, to receive the deposited certificates of the Prior Preference Stock of this Company the holders of which may elect to surrender the same for stock of The Borden Company, as hereinbefore provided, all such certificates to be deposited not later than June 14th, 1929, and upon the closing with The Borden Company, to receive from The Borden Company the certificate for its stock required for the liquidation of the Prior Preference Stock so surrendered, together with the necessary cash for the adjustment of odd shares, as set forth in said offer, and to deliver such certificates and to pay such cash to the depositors of Prior Preference Stock who shall have elected to take Borden stock in liquidation thereof, in the proportions and amounts set forth in said offer. Thereupon all certificates for Prior Preference Stock so surrendered shall forthwith be cancelled and such

stock shall no longer be deemed outstanding for any purpose whatsoever. All certificates so surrendered shall be duly endorsed and, if the Borden stock is to be issued in the name of any other than the registered holder of the Prior Preference Stock to be exchanged therefor, then the surrendered Prior Preference Stock certificates shall be duly endorsed in blank or accompanied by proper instruments of assignment, with signatures guaranteed to the satisfaction of the said Commonwealth Bank of Baltimore, and accompanied by any papers that may be required to place them in transferable form together with funds at the rate of two cents per share to cover transfer taxes.

The President then submitted to the meeting a form of notice of redemption of the Prior Preference Stock of the Company and after discussion and on motion, duly made, seconded and unanimously carried, it was

RESOLVED, that this Board of Directors does hereby exercise its right to redeem all the outstanding Prior Preference Stock of this Company, and all of said stock is hereby called for redemption on July 1, 1929, at the office of Commonwealth Bank of Baltimore by paying therefor in cash \$107.50 per share and all accrued and unpaid dividends thereon to said date; and this Board does hereby authorize and direct that there be forthwith mailed to each holder of record of any shares of said Prior Preference Stock at the close of business on May 21st, 1929, at his, her or its address as shown by the books of this Company, a notice in which shall be stated the intention of this Company to redeem said Prior Preference Stock in whole, and the time and place for such redemption, all as provided by the certificate of incorporation of this Company, such notice to be substantially in the form previously presented to this meeting and hereby approved; and this Board does hereby direct and declare that no dividends shall accrue on said Prior Preference Stock from and after July 1, 1929, and that on and after that date the certificates for such Prior Preference Stock as may then be outstanding shall entitle the holders thereof to no rights whatsoever except to receive the

cash redemption price of \$107.50 per share and all accrued and unpaid dividends thereon to July 1, 1929, but without interest.

RESOLVED FURTHER, that Commonwealth Bank of Baltimore be and it hereby is appointed the agent of this Company for the purpose of the redemption of the said Prior Preference Stock and that the proper officers of this Company be and they hereby are authorized and directed to deliver to said Commonwealth Bank of Baltimore a certified list of the stockholders of record of the said Prior Preference Stock at the close of business on May 21st, 1929, and to keep said Commonwealth Bank of Baltimore advised as to any transfers of Prior Preference Stock which are made on the books between May , 1929, and the 1st day of July, 1929, and to furnish said Commonwealth Bank of Baltimore with a certified list of the holders of record of said Prior Preference Stock at the close of business on June 29, 1929.

RESOLVED FURTHER, that the transfer books for said Prior Preference Stock be permanently closed at the close of business on June 29, 1929.

RESOLVED FURTHER, that said Commonwealth Bank of Baltimore be and it hereby is directed upon receipt from this Company or from The Borden Company of sufficient monies to redeem the outstanding Prior Preference Stock of this Company (to wit, all Prior Preference Stock, the holders of which shall not have elected to receive stock of The Borden Company in liquidation thereof as hereinbefore provided) to pay out said monies on and after July 1, 1929, at the rate of \$107.50 for each share of Prior Preference Stock surrendered for redemption plus accrued dividends thereon to July 1, 1929. All such payments shall be made against surrender of the certificates for said Prior Preference Stock for cancellation. Said payments shall be made by check or draft to the order of the stockholder of record as shown by the certificate surrendered for redemption or, if payment is to be made to

anyone other than the stockholder of record, then the surrendered stock certificate shall be duly endorsed in blank or accompanied by proper instruments of assignment, with signatures guaranteed to the satisfaction of said Commonwealth Bank of Baltimore and accompanied by any papers that may be required to place it in transferable form, together with funds at the rate of two cents per share to cover transfer taxes. Provided that if any holder of Prior Preference Stock shall surrender the certificates therefor for redemption prior to July 1, 1929, the said Commonwealth Bank of Baltimore is hereby authorized and directed upon receipt of the necessary monies as aforesaid, to pay forthwith to such stockholder the redemption price of his stock plus accrued dividends thereon to the date when the said monies shall be received by the redemption agent or, if such certificates are surrendered after said date, then to the date of surrender; provided, however, that no accrued dividends shall be paid for any period subsequent to July 1, 1929. Any monies received from The Borden Company for the purpose of redeeming the Prior Preference Stock of this Company and not required for that purpose shall be returned to The Borden Company.

RESOLVED FURTHER, that the officers of this Company be and they hereby are authorized and directed to take any and all such steps (including the entering into of any contract which to them may seem desirable with Commonwealth Bank of Baltimore in connection with the redemption of the said Prior Preference Stock and to do any and all such acts and things as may be necessary or advisable to carry out the purposes of the foregoing resolutions.

RESOLVED FURTHER, that the proper officers of this Company be and they hereby are directed to certify a copy of these resolutions under the seal of this Company, and to lodge the same with the said Commonwealth Bank of Baltimore together with certified specimens of certificates for the said Prior Preference Stock of this Company and a certified copy of the certificate of incorporation.

On motion duly made, seconded and unanimously carried it was

RESOLVED, that prior to the formal dissolution of the Company the Directors shall cause the Company to be liquidated and that the general plan of liquidation shall be as follows:

After the Directors have paid or secured to be paid any and all liabilities of the Company, the assets of the Company then remaining shall be distributed among the Preferred and Common Stockholders of the Company at an equal rate per share of their holdings, whether of Preferred or Common stock. In all other respects the details of the liquidation shall be determined by the Directors.

AND BE IT FURTHER RESOLVED that this resolution be laid before the meeting of the Stockholders of the Company which has been authorized to be called by other resolutions adopted at this meeting for May 21st, 1929.

And on motion duly made, seconded and unanimously carried, it was

RESOLVED that at the meeting of the Stockholders of Hendler Creamery Company, Incorporated, to be held on May 21st, 1929, John D. Brawner and H. B. Siegmund be and they hereby are appointed tellers to canvass and count the vote and/or votes cast at said meeting.

There being no further business, on motion, the meeting adjourned.

NATHAN LEOVITZ,

Secretary.

HENDLER CREAMERY COMPANY,
INCORPORATED.

MINUTES OF A SPECIAL MEETING OF STOCKHOLDERS.

Minutes of a special meeting of the Common and Preferred Stockholders of HENDLER CREAMERY COMPANY, INCORPORATED, a corporation of the State of Maryland, held at the principal office of the Company at Baltimore, Maryland, on May 21st, 1929, at 2.30 o'clock in the afternoon.

The President of the Company, Mr. L. Manuel Hendler called the meeting to order and presided throughout. The Secretary of the Company, Mr. Nathan Lebovitz acted as Secretary of the meeting and recorded the minutes.

The Secretary stated that the meeting had been duly warned in the manner provided by Section 19 of the General Law of the State of Maryland and presented the notice of the meeting, together with due proof by affidavit, that a copy of said notice had been served upon every holder of the Common and Preferred Stock of the Company issued and outstanding, in the manner and within the time provided by the By-Laws and the laws of the State of Maryland. On motion, duly made and seconded, the said notice and affidavit were ordered on file as a part of and appendix to the minutes of the meeting.

The Secretary presented a list of the Common and Preferred Stockholders and ascertained and reported that there were present at the meeting, in person or by proxy, the holders of 30,000 shares of the Common Stock of the Company out of 30,000 shares issued and outstanding, and the holders of 20,000 shares of the Preferred Stock of the Company out of 20,000 shares of the Preferred Stock issued and outstanding. The Secretary presented to the meeting a list of the holders of the Common and Preferred Stock so present in person or by proxy, together with the number of shares held by each, and in the case of stock represented by proxy, the names of the proxies. The said lists were duly ordered on file as a part of and appendix to the minutes of the meeting.

The Secretary further reported that the holders of more than two-thirds of the entire issued and outstanding Common Stock and of more than two-thirds of the entire issued and outstanding Preferred Stock were present at the meeting and that a quorum was in attendance.

On motion, duly made and seconded, the proxies presented were ordered on file as a part of and appendix to the minutes of the meeting.

The Secretary submitted and read to the meeting the minutes of the proceedings of the Board of Directors of this Company at a special meeting thereof held at the principal office of the Company at Baltimore, Maryland, on May 21st, 1929, at 2.00 o'clock in the afternoon, and also submitted and read to the meeting the minutes of the proceedings of the Board of Directors of this Company at a special meeting thereof held at the principal office of the Company at Baltimore, Maryland, on May 21st, 1929, at 2.00 o'clock in the afternoon, and also submitted and read to the meeting the agreement with The Borden Company approved by the directors at their said meeting.

The following resolutions were made and a vote taken by ballot:

RESOLVED that the Common and Preferred Stockholders of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland, present at this meeting, constituting the holders of more than two-thirds of the issued and outstanding Common Stock and more than two-thirds of the issued and outstanding Preferred Stock of this Company, do hereby

- (1) Authorize that said Hendler Creamery Company, Incorporated convey, pursuant to a plan of reorganization approved by the directors at a special meeting held May 21, 1929, its entire property, assets, business, trade name, patent and trademark rights and good will, including the entire capital stock of each of its subsidiaries, or, if The Borden Company should so request in lieu thereof the entire property, assets, business, trade name, patent and trademark

rights and good will of all or any thereof, to The Borden Company, a corporation of the State of New Jersey, in exchange for which The Borden Company will (a) issue and deliver to this Company, or upon its order, certificates for eighty-six thousand seven hundred and sixteen (86,716) shares of the par value of Twenty-five Dollars (\$25) each of the full paid and non-assessable capital stock of The Borden Company and (b) assume and agree to pay all liabilities of the Company and of each subsidiary thereof which may convey its assets and business to The Borden Company as the same exist at the date of the closing of title to The Borden Company, excepting such liabilities as are expected in said plan of reorganization, and (c) provide for the liquidation of this Company's Prior Preference Stock at the option of the holders thereof either by payment of the sum of \$107.50 per share plus an amount equal to the accrued and unpaid dividends thereon, as provided in said plan of reorganization, or by the issuance of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of \$25 per share in exchange for every three shares of the Prior Preference Stock of this Company, all as more specifically set forth in said plan of reorganization.

- (2) Approve the agreement with The Borden Company which has been submitted and read to this meeting containing the terms and conditions of the proposed conveyance and plan of reorganization.
- (3) Ratify, approve and confirm all and every the proceedings of the Board of Directors of this Company at a special meeting thereof held May 21st, 1929, as shown by the minutes of the said meeting now presented to the stockholders present at this meeting, as well as all action taken and all things done by the officers of this Company, pursuant to the resolutions of the directors, adopted at the said meeting thereof; and each and all of the said proceedings of the

directors and of the officers are hereby adopted, approved and confirmed.

- (4) Authorized and empower the officers and directors of this Company to execute, acknowledge and file all such papers and certificates and to do all such things as shall be requisite and necessary to carry out said conveyance of all the property, assets, business, trade name, trademark and patent rights and good will to The Borden Company.

FURTHER RESOLVED, that the charter of Hendler Creamery Company, Incorporated, be and the same hereby is amended so as to change the name of the Company from "Hendler Creamery Company, Incorporated" to "Creameries, Inc."; and that Article Second of said charter be amended so that as amended it shall read as follows:

"Second: The name of the corporation (which is hereafter called "Corporation") is: Creameries, Inc.

That the proper officers of this Company be, and they hereby are, authorized and instructed to make, verify and file all such certificates of the change in the corporate name and/or articles of amendment as may be required by the laws of the State of Maryland.

FURTHER RESOLVED, That it is advisable to and this Company does elect to wind up and dissolve. That the proper officers of this Company be, and they hereby are, authorized and instructed to make, verify and file such petition for dissolution, and such other statements and/or papers as may be required by the laws of the State of Maryland, and that the directors and officers of the Company are directed to take all such steps as may be necessary to wind up the affairs of this Company, and to distribute its assets to the stockholders.

RESOLVED, That prior to the formal dissolution of the Company the Directors shall cause the Com-

pany to be liquidated and that the general plan of liquidation shall be as follows:

After the Directors have paid or secured to be paid any and all liabilities of the Company, the assets of the Company then remaining shall be distributed among the Preferred and Common Stockholders of the Company at an equal rate per share of their holdings, whether of Preferred or Common Stock. In all other respects the details of the liquidation shall be determined by the Directors.

The taking of the vote having been completed and the ballots counted, the Tellers reported that out of a total of 30,000 shares of the Common Stock present at the meeting 30,000 shares, constituting more than two-thirds of the total number of shares of the Common Stock of the Company issued and outstanding, were voted for the adoption of the said resolutions and that out of a total of 20,000 shares of the Preferred Stock present at the meeting, 20,000 shares, constituting more than two-thirds of the total number of shares of the Preferred Stock of the Company issued and outstanding, were voted for the adoption of the said resolutions, and that no shares of the capital stock were voted against their adoption, and that the resolutions had been adopted by the affirmative vote of shareholders holding at least two-thirds of the Common Stock and at least two-thirds of the Preferred Stock of the Company.

The resolutions were thereupon declared by the Chairman to have been duly adopted by the vote of the holders of more than two-thirds of the Common Stock and more than two-thirds of the Preferred Stock of the Company.

On motion, duly made and seconded, the meeting then adjourned.

NATHAN LEBOVITZ,

Secretary.

WAIVER OF NOTICE

MEETING OF STOCKHOLDERS OF

HENDLER CREAMERY COMPANY, INCORPORATED.

The undersigned, being the holders of the number of shares of Preferred Stock and Common Stock of Hendler Creamery Company, Incorporated, set after their respective names, and together constituting all of the stockholders of said Company, do hereby waive notice of a special meeting of stockholders to be held at 1100 E. Baltimore Street, Baltimore, Maryland, on the 21st day of May, 1929, at 2.30 o'clock in the afternoon, for the purpose of considering and approving the action taken by the Board of Directors of the Company at a meeting held on the 21st day of May, 1929, and particularly the following propositions:

1. To authorize that said Hendler Creamery Company, Incorporated, pursuant to a plan of reorganization approved by the directors, convey all of its property, assets, business, trade name and good will, including the entire capital stock of each of its subsidiaries, or, should The Borden Company so request, in lieu thereof the entire property, assets, business, trade name and good will of all or any of said subsidiaries, to The Borden Company, a corporation of the State of New Jersey, for the consideration and upon the terms and conditions as shown by the minutes of a meeting of the Board of Directors, held May 21st, 1929.
2. To approve the agreement with The Borden Company, which will be submitted to the meeting, containing the terms and conditions of the proposed conveyance and plan of reorganization.
3. If such conveyance to The Borden Company be approved, to amend Article Second of the Charter of the Company so that as amended it shall read as follows:

"Second: The name of the corporation (which is hereinafter called 'Corporation') is:

CREAMERIES, INC."

4. To ratify, confirm and approve the proceedings of the Board of Directors of the Company at their meeting held on May 21, 1929, as shown by the minutes of said meeting presented to the stockholders; to ratify, confirm and approve all action taken by the officers of the Company pursuant to the resolutions adopted by the directors at their said meeting.
5. If such conveyance to The Borden Company be approved, to vote in favor of a resolution that the Company be dissolved.
6. To take any and all such further action in connection with the above matters, or any of them, as the stockholders present at such meeting shall approve.

AS WITNESS our hands and seals this 21st day of May, 1929.

Name	Preferred Stock	Common Stock
(Signed)		

L. Manuel Hendler
Nathan Lebovitz
Irvin D. Baxter
Adam Deupert
C. C. Croggon
Rose Hendler
Louis Hendler
Michael Hendler
B. R. Hendler
Harry C. Cover
J. D. Brawner
Harry Hendler
Harry A. Duke
J. A. Robison
Harry B. Siegmund
Harry K. Bosch
Daniel F. Banks, Jr.
John W. Rogers

	Common Stock	Preferred Stock
L. Manuel Hendler.....	24,650	16,667
Nathan Lebovitz	1,250	833
Irvin D. Baxter.....	100	....
Adam Deupert	200	....
C. C. Croggon	50	....
Rose Hendler	1,500	1,000
Louis Hendler	250	167
Michael Hendler	500	333
B. R. Hendler.....	1,025	683
Harry Hendler	250	167
Harry C. Cover.....	50	33
John D. Brawner.....	37	25
Harry A. Duke.....	50	33
J. A. Robison.....	25	17
Harry K. Bosch.....	25	17
Harry B. Siegmund.....	12	8
Daniel F. Banks, Jr.....	13	9
John W. Rogers.....	13	8
Total.....	30,000	20,000

I, NATHAN LEBOVITZ, Secretary of Hendler Creamery, Inc., certify that the foregoing is a list of Common and Preferred Stockholders of record May 21, 1929.

As Witness my hand and the corporate seal of the Company this 25th day of May, 1929.

NATHAN LEBOVITZ,
Secretary.

HENDLER CREAMERY COMPANY,
INCORPORATED

STOCKHOLDERS' PROXY

Common
Preferred

Number of shares

KNOW ALL MEN BY THESE PRESENTS, that the undersigned stockholder of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland,

does hereby nominate, constitute and appoint L. Manuel Hendler and Nathan Lebovitz, and each of them, the true and lawful attorney, or attorneys, for and in the name, place and stead of the undersigned, to vote and act upon and consent in respect to any and all shares of the capital stock of said Company held or owned by or standing in the name of the undersigned, at a special meeting of the Common and Preferred Stockholders of said Company, to be held at the principal office of the said Company, No. 1100 E. Baltimore Street, in the City of Baltimore, State of Maryland, on 1929, at o'clock in the noon, and at any and all adjournments thereof, as fully as the undersigned could do if personally present, with full power of substitution and revocation in the premises.

Without any limitation of the authority hereinabove given, the said attorney, or attorneys, and his or their substitutes, are hereby expressly authorized to vote in favor of the following propositions:

1. To authorize that said Hendler Creamery Company, Incorporated, pursuant to a plan of reorganization approved by the directors, convey all of its property, assets, business, trade name and good will, including the entire capital stock of each of its subsidiaries, or should The Borden Company so request, in lieu thereof the entire property, assets, business, trade name and good will of all or any of said subsidiaries, to The Borden Company, a corporation of the State of New Jersey, for the considerations and upon the terms and conditions as shown by the minutes of a meeting of the Board of Directors, held , 1929.
2. To approve the agreement with The Borden Company, which will be submitted to the meeting, containing the terms and conditions of the proposed conveyance and plan of reorganization.
3. If such conveyance to The Borden Company be approved, to amend Article Second of the Charter of the Company so that as amended it shall read as follows:

"Second: The name of the corporation (which is hereinafter called "Corporation") is:

4. To ratify, confirm and approve the proceedings of the Board of Directors of the Company at their meeting held on _____, 1929, as shown by the minutes of said meeting presented to the stockholders; to ratify, confirm and approve all action taken by the officers of the Company pursuant to the resolutions adopted by the directors at their said meeting.
5. If such conveyance to The Borden Company be approved, to vote in favor of a resolution that the Company is dissolved, and for a general plan of liquidation whereby the net assets of the Company shall be distributed among the Preferred and Common Stockholders of the Company at an equal rate per share of their holdings, whether of Preferred or Common Stock.
6. To take any and all such further action in connection with the above matters, or any of them, as the Stockholders present at such meeting shall approve.

IN WITNESS WHEREOF, the undersigned has duly executed these presents.

Dated, _____, 1929.

.....
Witness:

.....
NOTE: This form of proxy should be dated, signed, witnessed and mailed in the enclosed envelope by each stockholder who does not expect personally to attend the meeting. Corporations having seals should affix them. Please fill in the blank left for the date of execution.

**HENDLER CREAMERY COMPANY,
INCORPORATED.****WAIVER OF NOTICE OF A SPECIAL MEETING
OF THE BOARD OF DIRECTORS.**

We, the undersigned, being the Board of Directors of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland, do hereby waive notice of the time and place of a special meeting of the said Board of Directors and of the business to be transacted at said meeting.

We hereby designate the 21st day of May, 1929, at two o'clock in the afternoon, as the time and the principal office of the Company at Baltimore, Maryland, as the place of such meeting of the said Board of Directors; the purpose of said meeting being to consider and take action upon the following propositions:

- (1) To consider the advisability of conveying pursuant to a plan of reorganization, all of the property, assets, business, trade name and good will of Hendler Creamery Company, Incorporated, including the entire capital stock of each of its subsidiary companies, or should The Borden Company desire, in lieu of the stock thereof, the entire property, assets, business, trade name and good will of each or any of such subsidiaries to The Borden Company, a corporation of the State of New Jersey, and if such conveyance be approved, to authorize the Company to enter into an agreement with said The Borden Company for such conveyance to it upon such terms and conditions as the Board of Directors shall deem expedient and for the best interests of the Company.
- (2) If such proposed conveyance to The Borden Company be approved by the directors, to adopt a resolution to call and redeem all the Prior Preference Stock of this Company on July 1, 1929, at 107½ and accrued dividends.
- (3) If such proposed conveyance to The Borden Company be approved by the directors, to call a special meeting of the Common and Preferred

Stockholders of Hendler Creamery Company, Incorporated, for the purpose of considering such proposed conveyance and of taking action thereon and for the purpose of submitting to such stockholders for their approval the said agreement with The Borden Company.

- (4) If such proposed conveyance to The Borden Company be approved by the directors, to adopt a resolution declaring that it is advisable that the corporate name of the Company be changed from Hendler Creamery Company, Incorporated, to Creameries, Inc., and that a special meeting of the Common and Preferred Stockholders be called to consider and take action upon the said change in the corporate name.
- (5) If such proposed conveyance to The Borden Company be approved by the directors, to adopt a resolution declaring that dissolution is advisable, and that a special meeting of the Common and Preferred Stockholders be called to consider and take action upon the dissolution of the Company.
- (6) To take any and all such further action in connection with the above matters, or any of them, as the directors present at the said meeting shall approve.

And we do hereby waive all requirements of the laws of the State of Maryland and of the By-Laws of this Company as to notice of the time and place and object of said meeting.

Dated, Baltimore, Maryland; May 21, 1929.

L. MANUEL HENDLER,

NATHAN LEBOVITZ,

IRVIN D. BAXTER,

ADAM DEUPERT,

J. D. BRAWNER,

A. R. HENDLER,

HARRY C. COVER.

EXHIBIT "C-1"

Resolutions of the Hendler Creamery Company calling for redemption First Mortgage 6% Convertible Gold Bonds.

HENDLER CREAMERY COMPANY, INCORPORATED**MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS.**

May 15, 1929.

A special meeting of the Board of Directors of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland, was duly held at the principal office of said Company at Baltimore, Maryland, on May 15, 1929, at 9:30 o'clock in the forenoon, pursuant to waiver of notice.

The following named Directors were present: Messrs. Deupert, L. M. Hendler, B. R. Hendler, Cover, Brawner and Lebovitz, constituting a majority of the Board and a quorum.

The President of the Company, L. Manuel Hendler, called the meeting to order and presided throughout.

The Secretary of the Company, Nathan Lebovitz, acted as Secretary of the meeting.

The Secretary presented the waiver of notice and consent signed by all of the Directors fixing the time and place of the meeting and the business to be transacted thereat.

On motion duly made and seconded, the said waiver and consent was ordered filed with the minutes of this meeting.

The President then stated a plan of effecting a reorganization of the Company by conveying its entire assets and business to The Borden Company, a corporation of the State of New Jersey, was being negotiated and probably would be closed within the next few days, subject to further consideration and approval by this Board.

The President further stated that under said plan all of the outstanding First Mortgage 6% Convertible Gold Bonds of this Company shall be called for redemption on July 1st, 1929, and that he believed it would be advanta-

geous to the Company and to its stockholders to authorize the call of said bonds now.

After discussion, on motion duly made, seconded and unanimously carried, it was

RESOLVED

1. That Hendler Creamery Company, Incorporated, redeem and pay on July 1, 1929, all its issued and outstanding First Mortgage 6% Convertible 20 year Gold Bonds now unredeemed and unpaid issued under its Indenture dated as of July 1, 1926, to Commonwealth Bank of Baltimore, as Trustee.
2. That Hendler Creamery Company, Incorporated, do make, constitute and appoint Commonwealth Bank of Baltimore its attorney in its name and on its behalf and at its expense to advertise and publish notice, pursuant to the provisions of Article IV of the said Indenture dated as of July 1, 1926, of the redemption on July 1, 1929, of all bonds issued and outstanding under said Indenture now unredeemed and unpaid at their principal amount, plus accrued interest, plus a premium of $7\frac{1}{2}\%$ of their principal amount in accordance with the terms of said Article IV of said Indenture, and to perform and do each and every act and thing required under and pursuant to Article IV of said Indenture in connection with the redemption prior to maturity of the bonds issued under said Indenture.
3. That the President and Secretary of the Company be and they hereby are authorized, empowered and directed to execute, acknowledge and deliver, for and in behalf of the Company, such power of attorney to the said Commonwealth Bank of Baltimore.
4. That the Secretary of the Company be and he hereby is authorized and directed to give notice to said Commonwealth Bank of Baltimore, Trustee, of the purpose and intention of the Company so to redeem and pay on July 1, 1929, all bonds then issued and outstanding and secured by said Indenture, and to accompany said notice with a copy of these resolutions by him certified under the seal of the Company.

RESOLVED FURTHER, That the Treasurer of this Company be and he hereby is authorized and directed to make the necessary arrangements for the deposit with said Commonwealth Bank of Baltimore of sufficient funds to pay the redemption price and accrued interest on the said bonds.

There being no further business, on motion the meeting adjourned.

(Signed) NATHAN LEBOVITZ,

Secretary.

I HEREBY CERTIFY that the foregoing is a true and correct copy of the minutes of the meeting of the Board of Directors of Hendler Creamery Company, Incorporated, held on the 15th day of May, 1929.

AS WITNESS my hand and the corporate seal of the corporation this 15th day of May, 1929.

(Signed) NATHAN LEBOVITZ,

Secretary.

EXHIBIT "C-2"

Resolutions of the Hendler Creamery Company calling for redemption prior preference stock.

EXCERPTS FROM MINUTES OF

**SPECIAL MEETING OF BOARD OF DIRECTORS OF
HENDLER CREAMERY COMPANY, INCORPORATED**

May 21, 1929

RESOLVED, that upon the Common and Preferred stockholders at the special meeting held for that purpose consenting to the conveyance of the business, assets, property, trade name and good will of this Company to The Borden Company, provision be made for the liquidation of all of the Prior Preference Stock of this Company in accordance with the plan of reorganization set forth in the said proposed contract with The Borden Company, either (1) by payment to the holders thereof of the re-

redemption price, to wit, \$107.50 per share and accrued dividends thereon accumulated to the closing of title to The Borden Company, or, if the certificates therefor are surrendered after the closing, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, or (2) at the option of the holders of such Prior Preference Stock by the delivery of four shares of the full-paid and non-assessable capital stock of The Borden Company of the par value of \$25 per share for each three shares of the Prior Preference Stock of this Company.

The President then submitted to the meeting a form of offer to the holders of the Prior Preference Stock of the Company to be mailed in accordance with the foregoing resolution and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that the form of offer presented to this meeting be and it hereby is approved and adopted, and the proper officers of this Company be and they hereby are authorized and instructed to mail a copy of such notice to each holder of Prior Preference Stock of record at the close of business on May 21st, 1929.

RESOLVED FURTHER, that Commonwealth Bank of Baltimore be and it hereby is appointed agent and depository of this Company, to receive the deposited certificates of the Prior Preference Stock of this Company the holders of which may elect to surrender the same for stock of The Borden Company, as hereinbefore provided, all such certificates to be deposited not later than June 14th, 1929, and upon the closing with The Borden Company, to receive from The Borden Company the certificate for its stock required for the liquidation of the Prior Preference Stock so surrendered, together with the necessary cash for the adjustment of odd shares, as set forth in said offer, and to deliver such certificates and to pay such cash to the depositors of Prior Preference Stock who shall have elected to take Borden stock in liquidation thereof, in the proportions and amounts set forth in said offer. Thereupon all certificates for Prior Preference Stock so

surrendered shall forthwith be cancelled and such stock shall no longer be deemed outstanding for any purpose whatsoever. All certificates so surrendered shall be duly endorsed and, if the Borden stock is to be issued in the name of any other than the registered holder of the Prior Preference Stock to be exchanged therefor, then the surrendered Prior Preference Stock certificates shall be duly endorsed in blank or accompanied by proper instruments of assignment, with signatures guaranteed to the satisfaction of the said Commonwealth Bank of Baltimore, and accompanied by any papers that may be required to place them in transferable form together with funds at the rate of two cents per share to cover transfer taxes.

The President then submitted to the meeting a form of notice of redemption of the Prior Preference Stock of the Company and after discussion and on motion, duly made, seconded and unanimously carried, it was

RESOLVED, that this Board of Directors does hereby exercise its right to redeem all the outstanding Prior Preference Stock of this Company, and all of said stock is hereby called for redemption on July 1, 1929, at the office of Commonwealth Bank of Baltimore by paying therefor in cash \$107.50 per share and all accrued and unpaid dividends thereon to said date; and this Board does hereby authorize and direct that there be forthwith mailed to each holder of record of any shares of said Prior Preference Stock at the close of business on May 21st, 1929, at his, her or its address as shown by the books of this Company, a notice in which shall be stated the intention of this Company to redeem said Prior Preference Stock in whole, and the time and place for such redemption, all as provided by the certificate of incorporation of this Company, such notice to be substantially in the form previously presented to this meeting and hereby approved; and this Board does hereby direct and declare that no dividends shall accrue on said Prior Preference Stock from and after July 1, 1929, and that on and after that date the certificates for such Prior Preference Stock as may then be outstanding shall entitle the holders thereof to no rights whatsoever except to

receive the cash redemption price of \$107.50 per share and all accrued and unpaid dividends thereon to July 1, 1929, but without interest.

RESOLVED FURTHER, that Commonwealth Bank of Baltimore be and it hereby is appointed the agent of this Company for the purpose of the redemption of the said Prior Preference Stock and that the proper officers of this Company be and they hereby are authorized and directed to deliver to said Commonwealth Bank of Baltimore a certified list of the stockholders of record of the said Prior Preference Stock at the close of business on May 21st, 1929, and to keep said Commonwealth Bank of Baltimore advised as to any transfers of Prior Preference Stock which are made on the books between May , 1929, and the 1st day of July, 1929, and to furnish said Commonwealth Bank of Baltimore with a certified list of the holders of record of said Prior Preference Stock at the close of business on June 29, 1929.

RESOLVED FURTHER, that the transfer books for said Prior Preference Stock be permanently closed at the close of business on June 29, 1929.

RESOLVED FURTHER, that said Commonwealth Bank of Baltimore be and it hereby is directed upon receipt from The Borden Company of sufficient monies to redeem the outstanding Prior Preference Stock of this Company (to wit, all Prior Preference Stock, the holders of which shall not have elected to receive stock of The Borden Company in Liquidation thereof as hereinbefore provided) to pay out said monies on and after July 1, 1929, at the rate of \$107.50 for each share of Prior Preference Stock surrendered for redemption plus accrued dividends thereon to July 1, 1929. All such payments shall be made against surrender of the certificates for said Prior Preference Stock for cancellation. Said payments shall be made by check or draft to the order of the stockholder of record as shown by the certificate surrendered for redemption or, if payment is to be made to anyone other than the

stockholder of record, then the surrendered stock certificate shall be duly endorsed in blank or accompanied by proper instruments of assignment, with signatures guaranteed to the satisfaction of said Commonwealth Bank of Baltimore and accompanied by any papers that may be required to place it in transferable form, together with funds at the rate of two cents per share to cover transfer taxes. Provided that if any holder of Prior Preference Stock shall surrender the certificates therefor for redemption prior to July 1, 1929, the said Commonwealth Bank of Baltimore is hereby authorized and directed, upon receipt of the necessary monies as aforesaid, to pay forthwith to such stockholder the redemption price of his stock plus accrued dividends thereon to the date when the said monies shall be received by the redemption agent or, if such certificates are surrendered after said date, then to the date of surrender; provided, however, that no accrued dividends shall be paid for any period subsequent to July 1, 1929. Any monies received from The Borden Company for the purpose of redeeming the Prior Preference Stock of this Company and not required for that purpose shall be returned to The Borden Company.

RESOLVED FURTHER, that the officers of this Company be and they hereby are authorized and directed to take any and all such steps (including the entering into of any contract which to them may seem desirable with Commonwealth Bank of Baltimore in connection with the redemption of the said Prior Preference Stock and to do any and all such acts and things as may be necessary or advisable to carry out the purposes of the foregoing resolutions.

RESOLVED FURTHER, that the proper officers of this Company be and they hereby are directed to certify a copy of these resolutions under the seal of this Company, and to lodge the same with the said Commonwealth Bank of Baltimore together with certified specimens of certificates for the said Prior Preference Stock of this Company and a certified copy of the certificate of incorporation.

EXHIBIT "D-1"

Notice of Redemption to Trustee of First Mortgage
6% Convertible Gold Bonds of Hendler Creamery Com-
pany, Inc.

May 15, 1929

Commonwealth Bank of Baltimore,
Howard and Madison Streets,
Baltimore, Maryland.

Dear Sirs:

We hereby notify you of our intention to redeem at
107½ and accrued interest on July 1st, 1929, all of our
outstanding First Mortgage 6% Convertible Twenty
Year Gold Bonds, issued under an Indenture dated as of
July 1st, 1926, between this Company and you as
Trustee.

This notice is given under the provisions of Article IV
of the Indenture, which begins on Page 47 thereof.

This Company has appointed you its agent and attor-
ney, in its name and on behalf, and at its expense, to ad-
vertise and publish notice pursuant to the provisions of
Article IV of the said Indenture of redemption on July
1st, 1929, and you are hereby authorized and empowered
to promptly have such notice inserted in some daily news-
paper published in Baltimore City.

You are further requested to give a similar notice by
mail, postage prepaid, at least thirty days prior to July
1st, 1929, to each registered owner, if any, of bonds, at
the address appearing upon the register of the bonds
kept by you.

We enclose you herewith a duly certified copy of the
resolutions adopted at a meeting of the Board of Direc-
tors of this Company held pursuant to waiver of notice
on Wednesday, May 15th, 1929, at 9.30 o'clock in the fore-
noon.

Very truly yours,

HENDLER CREAMERY COMPANY,
INCORPORATED,

(Signed) L. MANUEL HENDLER,
President.

ATTEST:

(Signed) NATHAN LEBOVITZ,
Secretary.

NOTICE OF REDEMPTION

TO THE HOLDERS OF

HENDLER CREAMERY COMPANY, INCORPORATED

FIRST MORTGAGE 6% CONVERTIBLE TWENTY-YEAR
GOLD BONDS.

Due July 1st, 1946.

Notice is hereby given that Hendler Creamery Company, Incorporated, by proper resolutions of its Board of Directors has elected to redeem and pay all of its outstanding First Mortgage 6% Convertible Twenty-Year Gold Bonds, due July 1st, 1946, at 107½ per centum of their face value and accrued interest on July 1st, 1929, at the office of the Commonwealth Bank of Baltimore, Baltimore, Maryland.

This notice is given in accordance with Article IV of the Indenture and Deed of Trust securing said bonds.

Said bonds should be presented at the office of the Bank, Howard and Madison Streets, Baltimore, Maryland, on July 1st, 1929, with the July 1st, 1929, and all subsequent coupons attached. From and after July 1st, 1929, interest upon said bonds will cease, and coupons representing such interest will become void.

All bonds so presented shall be in negotiable form.

HENDLER CREAMERY COMPANY,
INCORPORATED,

(Signed) L. MANUEL HENDLER,

President.

COMMONWEALTH BANK OF BALTIMORE,

Trustee.

By.....

EXHIBIT "D-2"

Notice of redemption to trustee of Prior Preference
Stock of Hendler Creamery Company, Incorporated.

Baltimore, Md., May 22nd, 1929.

To the Holders of the Prior Preference Stock
of Hendler Creamery Company, Incorporated:

Hendler Creamery Company, Incorporated, has entered into a contract with The Borden Company, pursuant to which the two companies will be merged and in connection therewith The Borden Company will, among other things, and subject to certain conditions set forth in the said contract, provide for the liquidation of the Prior Preference Stock of this Company, either

(1) By the payment to the Prior Preference Stockholders of the sum of \$107.50 per share (being the redemption price of the said stock) plus accrued and unpaid dividends thereon to the date when the transaction with The Borden Company is closed, or, if the certificates therefor are surrendered after the closing, to the date of such surrender, provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929; or, at your option

(2) By the issuance of four fully paid shares of stock of The Borden Company, of the par value of \$25.00 per share, in exchange for every three shares of Prior Preference Stock of this Company. No fractional shares of The Borden Company Stock will be issued, and accordingly where holdings of Prior Preference Stock are not divisible by three, adjustments will be made for the odd share or shares as follows: For each three-fourths of a share not so divisible, one full share of Borden Company stock will be issued and for the remaining one-fourth of a share the depositor will receive one-fourth of a whole share's redemption price, to wit the sum of \$26.88 plus one-fourth of the accrued dividend on such share figured as above stated.

The directors of your Company believe that this offer of exchange to the holders of the Prior Preference Stock is a highly advantageous one. The par value of The Borden Company stock has recently been reduced from \$50 per share to \$25 per share, each stockholder receiving two

shares of the new stock for each share of the old stock. The old stock has sold on the New York Stock Exchange during the present calendar year as high as \$203.75 per share, while the low so far for 1929 is on the basis of the old stock, \$174.50 per share. The closing quotation for the new \$25 par stock on May 20th, 1929, was \$91.00 per share. At this price the value of four shares of Borden stock is considerably greater than the redemption price of three shares of the Prior Preference Stock, even if accrued dividends be added. The Borden Company has been paying dividends on its old \$50 par stock at the rate of \$6 per share per annum.

Pursuant to action of the Board of Directors of your Company, the Prior Preference Stock has been called for redemption on July 1, 1929, and notice of such redemption is enclosed herewith.

Any Prior Preference Stockholder who desires to avail himself of the opportunity to receive stock of the Borden Company should sign the enclosed form and deliver it, together with the certificate or certificates for his stock to Commonwealth Bank of Baltimore, which has been appointed the Redemption Agent for the Prior Preference Stock.

All certificates must be deposited not later than 2 o'clock P. M. June 14th, 1929, and unless so deposited the holder thereof will be deemed to have waived his right to receive the stock of The Borden Company. It is expected that the stock of The Borden Company will be issued to the depositing Prior Preference Stockholders on or about June 21, 1929. The first quarterly dividends therefore which stockholders accepting the Borden stock will receive will be that of September 1st, 1929.

Any Prior Preference Stockholder who prefers to receive redemption price of his stock should also surrender his certificate or certificates therefor to Commonwealth Bank of Baltimore, the Redemption Agent, and will receive therefor \$107.50 per share plus accrued dividends to the date of surrender, unless such certificates are surrendered prior to the closing of the transaction with The Borden Company, in which case he will receive, as soon as the closing has taken place, the redemption price of his stock plus accrued dividends to the date of closing.

All rights to accrued dividends on the Prior Preference Stock will cease on July 1, 1929, and Stockholders failing to surrender their certificates prior to that date will receive accrued dividends only to July 1, 1929.

All certificates surrendered, whether for the purpose of receiving The Borden Company stock or for the purpose of receiving the redemption price, should be endorsed, and if the cash is to be paid to, or the certificates of The Borden Company Stock issued in the name of, anyone other than the registered stockholder, the endorsement of the certificates must be guaranteed to the satisfaction of Commonwealth Bank of Baltimore and the surrendered certificates must be accompanied by any papers that may be required to place them in transferable form, together with funds the rate of two cents per share, to cover the transfer taxes thereon.

All Prior Preference Stockholders desiring to take advantage of this offer are urged to deposit their certificates with Commonwealth Bank of Baltimore as soon as possible after receipt hereof and not later than June 14th, 1929.

HENDLER CREAMERY CO., INC.

By L. MANUEL HENDLER,

President.

NOTICE OF REDEMPTION.

To the Holders of Prior Preference Stock
of Hendler Creamery Company, Incorporated:

NOTICE IS HEREBY GIVEN that at a meeting of the Board of Directors of HENDLER CREAMERY COMPANY, Incorporated, a corporation of the State of Maryland, duly held on May 21st, 1929, the right to redeem the whole of the Prior Preference Stock of the Company was by resolution duly exercised, and the whole of said stock called for redemption on July 1, 1929, on which date it is the intention of the Company to redeem the said stock, at the office of COMMONWEALTH BANK OF BALTIMORE, Howard and Madison Streets, in the City of Baltimore, Maryland, which is hereby ap-

pointed Agent of the Company for the purpose of such redemption, by the payment therefor in cash of the sum of \$107.50 per share and an amount equal to all accrued and unpaid quarterly dividends thereon to said date. In accordance with such resolution of the Board of Directors passed in pursuance of the provisions of the certificate of incorporation of the Company, no dividends will accrue on said Prior Preference Stock from and after July 1, 1929, and on and after July 1, 1929, the certificates for such Prior Preference Stock will entitle the holders thereof to no rights whatsoever except to receive, upon surrender of said certificates at the office of COMMONWEALTH BANK OF BALTIMORE the cash redemption price of \$107.50 per share and all accrued and unpaid dividends thereon to July 1, 1929, but without interest.

Payment of the redemption price and accrued dividends will be made by check or draft to the order of the registered Prior Preference Stockholder as shown by the certificate surrendered for redemption, which must be duly endorsed. If payment is to be made to anyone other than the registered stockholder, the stock certificate must be duly endorsed or accompanied by proper instruments of assignment; signature must be guaranteed to the satisfaction of COMMONWEALTH BANK OF BALTIMORE, and the surrendered certificate must be accompanied by any papers that may be required to place it in transferable form, together with funds at the rate of two cents per share to cover transfer taxes.

All transfers of record must be completed before the close of business on June 29, 1929, as at that time the transfer books for said Prior Preference Stock will be permanently closed.

By order of the Board of Directors.

HENDLER CREAMERY COMPANY,
INCORPORATED,

By NATHAN LEBOVITZ,

Secretary.

Dated: March 21, 1929.

....., 1929.

TO COMMONWEALTH BANK OF BALTIMORE,
BALTIMORE, MARYLAND.

The undersigned, Prior Preference Stockholder of Hendler Creamery Company, Incorporated, herewith deposits with you certificates for shares of said stock. Pursuant to the offer outlined in the letter from the Company to the Prior Preference Stockholders, dated May 22nd, 1929, the undersigned elects to receive for said stock a certificate for the capital stock of The Borden Company for such number of shares as shall equal four shares of The Borden Company Stock, of the par value of \$25 per share, for every three shares of Prior Preference Stock of Hendler Creamery Company, Incorporated, deposited by the undersigned. It is understood that no fractional shares of Borden Company stock will be issued and that if the number of shares of Prior Preference Stock deposited by the undersigned is not divisible by three, adjustment is to be made for the odd share or shares in the manner stated in the said letter to the Prior Preference Stockholders of May 22nd, 1929.

.....

EXHIBIT "E"

Proceedings of the Directors of The Borden Company adopting resolution authorizing its officers to execute the agreement with Hendler Creamery Company, Incorporated.

THE BORDEN COMPANY.

PROCEEDINGS OF DIRECTORS AUTHORIZING THE PURCHASE
OF
HENDLER CREAMERY COMPANY, INCORPORATED.

The President reported to the Board that representatives of the Company in consultation with him had been in negotiations for the purchase of substantially all the assets and business of Hendler Creamery Company, Incorporated (hereinafter called "Hendler Creamery"), a corporation of the State of Maryland, which conducts directly or through subsidiaries, an ice cream business

in the City of Baltimore and the surrounding territory. Said Company owns the entire issued and outstanding capital stock of three subsidiary corporations, namely Clover Ice Cream Company, Horn Ice Cream Company and Supreme Ice Cream Company.

The President stated that as a result of these negotiations an agreement had been reached with Messrs. L. Manuel Hendler and Nathan Lebovitz, who own more than 90% of the Common Stock and more than 90% of the Preferred Stock and control more than 20% of the Prior Preference Stock of Hendler Creamery, and that a contract was in course of preparation providing for the purchase by this Company of the entire assets and business of Hendler Creamery and its subsidiary companies. The President stated to the Board that the purchase price for the said assets and business, including the assets and business of the subsidiary corporations, would be by the issuance of 43,358 shares of the full paid and non-assessable capital stock of this Company of the par value of \$50 per share, or, if the par value of the shares of this Company's stock be reduced, as is now contemplated, 87,716 shares thereof of the par value of \$25 per share, having in either case an aggregate par value of \$2,167,900; by providing for the liquidation of all of the Prior Preference Stock of Hendler Creamery (including any Prior Preference Stock which may be issued after the date of said contract and prior to May 21, 1929, on the conversion of any of the First Mortgage Bonds of Hendler Creamery) at the option of the holders thereof, either by payment of \$107.50 per share and accrued dividends in cash or by the issuance of two shares of Borden stock of the par value of \$50 each in liquidation of three shares of said Hendler Creamery Prior Preference Stock (the ratio to be correspondingly adjusted if the par value of the Borden shares be reduced) and by the assumption of the liabilities of Hendler Creamery (including any bank liability which might arise as a result of the necessity of Hendler Creamery borrowing funds sufficient to purchase and/or retire its outstanding First Mortgage Bonds) excepting liability for capital stock and certain tax liabilities.

The President stated that Hendler Creamery Company, Incorporated, has outstanding \$675,000 principal amount of First Mortgage 6% Convertible 20-year Gold

Bonds. The First Mortgage Bonds are convertible into Prior Preference Stock on the basis of one share of such stock for each \$100 principal amount of bonds. The right to convert, if the bonds are called for redemption, ceases on the day prior to the passage of proper resolutions calling the bonds, and under the proposed contract such resolutions will be adopted not later than May 21, 1929. Hendler Creamery Company, Incorporated, has outstanding 12,000 shares of Prior Preference Stock, bearing dividends at the rate of \$7 per share per annum, so that if all the holders of such stock elect to take payment in cash the amount payable to them would be approximately \$1,376,550, or if they all should elect liquidation in Borden stock, the issuance of 8,400 shares of the par value of \$50 each, or 16,800 shares of the par value of \$25 each, would be required, plus such additional amount of cash or of the Company's stock as may be necessary to provide for the liquidation of any Prior Preference Stock of Hendler Creamery Company which may be issued prior to May 21, 1929, on the conversion of the First Mortgage 6% Convertible 20 Year Gold Bonds of Hendler Creamery.

The President further stated that the acquisition of the assets and business of Hendler Creamery and its subsidiaries would give the Company an entry into territory which it is not presently engaged in a similar business; that he considered the terms agreed upon fair and the proposed acquisition a desirable one and advantageous to the Company and he recommended that the officers of the Company be authorized to execute preliminary and final contracts covering the purchase substantially on the terms agreed to and reported to the meeting and to complete the purchase in accordance with such contract or contracts as may be executed. He further stated that, based upon the reports made to him, he was satisfied that the net cash value of the properties and business to be acquired will be well in excess of the par value of the stock of the Company to be issued therefor, plus any amounts to be paid and liabilities to be assumed by this Company.

General discussion then ensued.

On motion duly made and seconded, and by the unanimous vote of all the Directors present, constituting

a majority of the entire Board and a quorum, the following preambles and resolutions were duly adopted:

WHEREAS, the President of the Company has reported to this Board the conclusion of negotiations for the purchase by this Company of the entire assets and business of Hendler Creamery Company, Incorporated (hereinafter referred to as "Hendler Creamery") and its subsidiary companies; and

WHEREAS, from the reports made to this Board, it appears that said Hendler Creamery directly and through wholly owned subsidiaries is engaged in the ice cream business in the City of Baltimore and the surrounding territory. The acquisition of the said assets and business will afford the Company entry into a territory where it does not now engage in a similar business and said acquisition will, in the opinion and judgment of this Board, be advantageous to and in the interests of this Company. For the assets and business so to be acquired by it, this Company is to pay by the issuance of 43,358 shares of the full paid and non-assessable capital stock of this Company of the par value of \$50 per share, or, if the par value of the shares of said stock be reduced, as is now contemplated, 86,716 shares thereof of the par value of \$25 per share; by providing for the liquidation of all of the Prior Preference Stock of Hendler Creamery (including any shares of Prior Preference Stock which may be issued after the date hereof and prior to May 21, 1929, upon the conversion of any of the First Mortgage Bonds of Hendler Creamery) at the option of the holders thereof, either by payment of \$107.50 per share and accrued dividends in cash or by the issuance of full paid and non-assessable shares of the capital stock of this Company in the ratio of two shares of the par value of \$50 each or four shares of the par value of \$25 each for three shares of said Hendler Creamery Prior Preference Stock; and by the assumption of the liabilities of Hendler Creamery (including any bank liability which might arise as a result of the necessity of Hendler Creamery borrowing funds sufficient to purchase and/or retire its outstanding First Mortgage Bonds) except liability for capital stock and certain tax liabilities.

In the opinion and judgment of this Board, the considerations to be received by this Company for its shares of stock to be issued as aforesaid are reasonably worth in money at a fair bona fide valuation well in excess of the par value of the stock to be issued therefor over and above all sums of money to be paid by this Company and all liabilities to be assumed by it; and

WHEREAS, this Board is of the opinion that even considering the present market price of the stock of The Borden Company, it will be to the advantage of this Company to make said purchase; now, therefore, be it

RESOLVED: (1) That the President or a Vice-President of this Company be and he hereby is authorized and empowered in the name and on behalf of this Company to execute such preliminary and/or final contracts with the controlling stockholders of Hendler Creamery or with Hendler Creamery itself, providing for the purchase by this Company of the entire assets and business of Hendler Creamery for a price to be paid by the issuance of 43,358 shares of the par value of \$50 each of the full paid and non-assessable capital stock of this Company, or, if the par value of said shares be reduced, as is now contemplated, 86,716 shares thereof, of the par value of \$25 each; by providing for the liquidation of 12,600 shares of Prior Preference Stock of Hendler Creamery (plus such additional shares of Prior Preference Stock as may be issued after the date hereof and prior to May 21, 1929 on the conversion of any of the First Mortgage Bonds of Hendler Creamery) at the option of the holders thereof, either (a) by the payment of the sum of \$107.50 per share plus accrued dividends in cash, or (b) by issuing additional shares of the capital stock of this Company in liquidation of said Prior Preference Stock, in the ratio of two shares of this Company's capital stock of the par value of \$50 each, or four shares of this Company's capital stock of the par value of \$25 each for three shares of said Hendler Creamery Prior Preference Stock, and by the assumption of the liabilities of said Hendler Creamery and its subsidiaries (including any bank

liability which might arise as a result of the necessity of Hendler Creamery borrowing funds sufficient to purchase and/or retire its outstanding First Mortgage Bonds) but excepting liability for capital stock, tax liabilities accruing by reason of the sale by Hendler Creamery of its assets and business to this Company and/or by reason of any business transacted by Hendler Creamery or its subsidiaries subsequent to the date of the conveyance of the said assets and business to this Company, and excepting additional income and/or excess profits taxes in respect of business transacted and/or income accrued prior to January 1, 1929, and excepting legal fees of counsel for Hendler Creamery in connection with the said contract and the transfer thereby provided; that said contract or contracts may contain such other or further terms and provisions as may be approved by the officer executing the same, his execution thereof to be conclusive evidence of such approval; that upon the execution and delivery of said contract or contracts, the executive officers of this Company be and they hereby are authorized and instructed to do all such acts and things and to execute all such instruments and papers as shall be necessary or in their judgment expedient in order to perform the said contract or contracts on the part of this Company and to issue certificates for the shares of the capital stock of this Company upon the terms and in the amounts hereinbefore authorized and that all shares of the capital stock of this Company so issued shall, upon the issuance thereof, be and be deemed to be full paid and not subject to any call or assessment.

(2) That the authority of The Seaboard National Bank of the City of New York Transfer Agent, and of Bankers Trust Company, Registrar, respectively, of the capital stock of this Company, be and it hereby is extended to cover the additional shares of the stock of this Company, the issuance of which is authorized by these resolutions.

(3) That application be made to the New York Stock Exchange for the listing of 51,758 shares of the par value of \$50 each, or 103,516 shares of the par value of \$25 each (plus such additional amount

of the Company's stock as may be necessary to provide for the liquidation of any Prior Preference Stock of Hendler Creamery Company, Incorporated, which may be issued prior to May 21, 1929, on the conversion of any of the First Mortgage 6% Convertible 20-Year Gold Bonds of Hendler Creamery Company, Incorporated) upon official notice of the issuance in payment for the assets and business of Hendler Creamery Company, Incorporated; and that Robert Struthers, Director; George M. Waugh, Jr., Vice-President; William P. Marsh, Secretary and Treasurer, and Donald Mackenzie, of counsel, of this Company or any one or more of them be designated by this Company to appear before the Committee on Stock List of the New York Stock Exchange with authority to make such changes in the said application or in any agreements relative thereto as may be necessary to conform with requirements for stock listing.

(4) That the executive officers of this Company be and they hereby are authorized if in their judgment such course be advisable, to cause to be formed such subsidiary company or companies to take over and operate the properties and business to be acquired by this Company from Hendler Creamery and its subsidiaries and/or to continue the existence of any of the existing subsidiaries of said Hendler Creamery and to make all such arrangements with respect to any of said matters as in their judgment may be necessary or advisable.

STATE OF NEW YORK, }
COUNTY OF NEW YORK } ss:

I, WILLIAM P. MARSH, Secretary of THE BORDEN COMPANY, a corporation of the State of New Jersey, do hereby certify that the foregoing are true and correct extracts of the proceedings taken at a meeting of the Board of Directors of The Borden Company, duly called and held at the office of the Company, No. 350 Madison Avenue, New York City, on April 17, 1929. I do further certify that a majority of the Directors, constituting a quorum, were present at said meeting and voted in favor of the adoption of the foregoing preambles and resolutions.

WITNESS my hand and the seal of the Company this 29th day of April, 1929.

(Signed) W. P. MARSH,
Secretary.

EXHIBIT "F"

Letter dated June 27, 1929, from The Borden Company to the Commonwealth Bank giving instructions and enclosing check for retirement of the First Mortgage Gold Bonds of Hendler Creamery Company, Incorporated.

June 27, 1929.

National Commonwealth Bank of Baltimore,
Baltimore, Maryland.
Gentlemen:

Referring to the bonds of the Hendler Creamery Company which have been called for redemption on July 1st, 1929, we have today deposited in the Guaranty Trust Company of New York, for credit to the account of your bank, the sum of \$381,225.00, being an amount sufficient for the redemption of \$345,000 face value of bonds, plus \$25,875 covering premium of \$7.50 per \$100 bond, and accrued interest to July 1, 1929, of \$10,350.

In addition to the above you hold for our account \$127,000 face value of bonds, bought in open market, \$22,000 face value of bonds owned by Sharpless-Hendler Company, and \$7,000 face value of Treasury Bonds. This letter will be your authority to cancel said bonds on July 1st without payment.

We shall be glad to have you render us a bill covering your charges in connection with this transaction, which upon its receipt, will be given prompt attention.

Yours very truly,

THE BORDEN COMPANY,

WPM/MF

Treasurer.

In addition to the photostatic copy of correspondence enclosed, as mentioned above, we are attaching hereto photostatic copy of checks of The Borden Company, as follows:

Check Number	Date	Payable to:	Drawn on:	Amount
637	May 24, 1929	Guaranty Trust Co. for transfer to Commonwealth Bank of Baltimore.	National Bank of Commerce	\$130,867.40.
110538	June 5, 1929	Sharpless-Hendler Ice Cream Company, Inc.	The Seaboard Nat'l Bank	21,875.00
111691	July 10, 1929	Sharpless-Hendler Ice Cream Company, Inc.	The Seaboard Nat'l Bank	330.00
643	June 27, 1929	Guaranty Trust Co. Cr. account of Commonwealth Bank of Baltimore.	National Bank of Commerce	381,225.00
Total				\$534,297.40

BORDEN'S.

Check

111691

Date	Voucher No.	Pay to the order of	Amount
July 10, 1929	Treas.	Sharpless Hendler Ice Cream Co.	\$330.00
.....Three Hundred thirty and no/100.....Dollars			

THE BORDEN COMPANY.

PAID

The Seaboard National Bank
Uptown Branch
24 E. 45th Street, New York

Auditor
ELH

On reverse side of check
For Deposit
Sharpless-Hendler
Cream Co.

Pay to the order of
Any Bank, Banker or Trust Co.
Security Trust Company
62-8 62-8

Wilmington, Del.
T. J. Mowbray, Treasurer.

Received payment
Through New York Clearing House
Prior endorsements guaranteed
July 13, 1929
1-23 Guaranty Trust Co. of New York
Successor to
Bank of Commerce in New York
Formerly
Nat'l Bank of Commerce in New York
Transit Department

BORDEN'S
Established 1857
New York

Check
637

Date	Voucher No.	Pay to the order of	Amount
May 24, 1929	Treas.	Guaranty Trust Company	\$130,867.40
One hundred thirty thousand eight hundred sixty-seven			
			40/100 Dollars

THE BORDEN COMPANY

To
National Bank of Commerce
in New York

J. D. Baum,
Treasurer.

Audited
GB

Cancelled—5-27-29

L. MANUEL HENDLER, ETC., APPELLEE.

89

BORDEN'S
Established 1857
New York

Check
643

Date	Voucher No.	Pay to the order of	Amount
June 27, 1929	Treas.	Guaranty Trust Company Cr. Acct. National Commonwealth Bank of Baltimore	\$381,225.00

Three hundred eighty-one thousand two hundred twenty-five and no/100.....Dollars

THE BORDEN COMPANY,

To

National Bank of Commerce
in New York

J. D. Baum,
Treasurer.

Audited
AWV

Cancelled 6-28-29

BORDEN'S
Established 1857
New York

Check
110538

Date	Voucher No.	Pay to the order of	Amount
June 5, 1929	Treas.	Sharpless Hendler Ice Cream Company	\$21,875.00

PAID
6-10-29

Twenty-one thousand eight hundred seventy-five
and no/100 Dollars

THE BORDEN COMPANY,

The Seaboard National Bank
Uptown Branch
24 E. 45th St., New York

J. D. Baum,
Authorized signature.

Audited
HWD

On Reverse Side

For Deposit—Sharpless-Hendler Ice Cream Co.
 Pay to the order of any Bank, Banker or Trust Co.
 Prior endorsements guaranteed
 Security Trust Company

62-8

62-8

Wilmington, Del.

T. J. Mowbray, Treasurer

Jun 17, '29

Received payment through New York Clearing House
 Prior endorsements guaranteed

Jun 18, 1929

1-23 Guaranty Trust Co. of N. Y. 1-23

Successor to

Bank of Commerce in New York
 formerly

Nat'l Bank of Commerce in New York
 Transit Dept.

EXHIBIT "G"

Report of the Internal Revenue Agent in charge (Baltimore, Maryland) dated March 31, 1931, covering examination of 1929 income tax return of creameries, incorporated (formerly Hendler Creamery Company, Incorporated), proposed additional tax in the amount of \$11,852.09.

TREASURY DEPARTMENT**INTERNAL REVENUE SERVICE**

FGMcF

Baltimore, Md.

May 11, 1931

OFFICE OF

Internal Revenue
 Agent in Charge.

Creameries, Incorporated In re:
 1100 E. Baltimore Street,
 Baltimore, Md.

Date of report: March 31, 1931
 Years covered: 1929

Gentlemen:

There is attached a statement of adjustments which this office proposes to recommend, affecting your income

tax liability. If the adjustments suggested are satisfactory, and you do not desire to file a protest, the inclosed agreement form should be signed by you and forwarded to this office. Interest is payable on deficiencies found due as set forth on the attached Form 882.

If you do not agree with the conclusions set forth in the inclosed statement it is desired that every opportunity be afforded you to present to this office any objections or additional information. You are accordingly granted thirty days from date of this letter within which you may, if you so desire, protest the proposed adjustments. The protest and any additional statement of facts must be submitted to this office, executed in triplicate under oath, and should contain the following information:

(a) The name and address of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation; (c) the designation by date and symbol of the letter advising of the proposed deficiency with respect to which the protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; (g) in case the taxpayer desires a hearing, a statement to that effect; and (h) in case the protest is prepared or filed by an attorney or agent it shall have thereon a statement signed by such attorney or agent showing whether or not he prepared it and whether or not the attorney or agent knows of his own knowledge that the facts therein are true.

If a protest is filed it will be given careful consideration in this office before the recommendations are forwarded to Washington for action. In the event that you do not protest within the thirty-day period, the case will be forwarded immediately thereafter to the Bureau at Washington for review.

In the event the recommendations are not approved upon review in Washington, you will be notified and given

opportunity to discuss the changes with this office, or should you fail to protest to this office, *any protest which you may subsequently file with Washington will be referred to this office for consideration.*

If a deficiency is indicated no remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your district.

Please acknowledge receipt by return mail.

Respectfully,

E. E. HEARN,

Internal Revenue Agent in Charge.

Inclosures:

Statement of adjustments

Forms 882 and 870

WAIVER OF RIGHT TO FILE A PETITION WITH THE UNITED STATES BOARD OF TAX APPEALS

The undersigned taxpayer hereby waives the right to file a petition with the United States Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926, and/or Section 272 (a) of the Revenue Act of 1928, and consents to the assessment and collection of a deficiency in income tax for the calendar year ended December 31, 1929 in the sum of \$11,852.09 together with interest as provided by law.

.....
Name

.....
Address

Date..... By.....

Note: This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 606 of the Revenue Act of 1928, but its execution and filing at the address shown in the accompanying letter will expedite the adjustment of your income tax liability as indicated above.

Where the taxpayer is a corporation, the agreement shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

EXCERPTS FROM REPORT OF INTERNAL REVENUE AGENT IN CHARGE

MARCH 31, 1931

Page 6—" (e) Unamortized Bond discount on bonds redeemed July 1, 1929. It is the contention of the examining officer that the payment of the bonds of the Hendler Creamery Company, Inc., was assumed by the Borden Company when they acquired the assets and assumed the liabilities of the Hendler Creamery Co., Inc., and that such unamortized discount and bond expense followed the bond issue.

Prior to date of call and redemption of the bonds, the bondholders exchanged 174,000.00 of the bonds for preferred stock of the taxpayer. The unamortized discount on these bonds amounted to 10,412.50, which is included in the 40,755.11 claimed as a deduction. See Exhibit F."

Page 7—" (h) Premium on Bonds retired—When the bonds of The Hendler Creamery Company were redeemed by The Borden Company on July 1, 1929 (they acquiring all the assets and liabilities on July 21, 1929), they paid to the stockholders a premium of 26,569.40. It is contended by the examining officer that this premium is not a deduction to the vendor but to The Borden Company who were liable for the redemption of the bonds and such premiums that were due at redemption date."

Page 18—"Computation of Tax—Year ended 12/31/29.

INCOME TAX

Net income for taxable year	109,879.87
Less net loss	2,133.64
Net income	107,746.23
Balance subject to tax	107,746.23
Income tax 11%	11,852.09
Total tax assessable	11,852.09
Total previously assessed	None
Additional Tax to be assessed	11,852.09

Schedule 7-A

EXPLANATION OF ITEMS

The taxpayer filed a tentative return for the year 1929 in which he paid a tentative quarterly payment of 1,605.59. The proposed assessment of 6,422.34 was not placed on the collector's books as an assessment, but the payment of 1,605.59 was treated merely as an open advance payment."

Page 24

EXHIBIT "F"

ANALYSIS OF DISCOUNT ON FIRST MORTGAGE BONDS

		Principal Balance	Discount Balance
July 1, 1926, Bonds issued		700,000.00	49,000.00
1926 Bonds redeemed	18,000.00	682,000.00	
1926 Unamortized Disc.			
on bonds redeemed			1,244.25
1926 Annual discount chg.			1,209.27
1927 do			2,387.04
1928 Bonds redeemed	7,000.00	675,000.00	
1928 Unamortized disc.			
on bonds redeemed			432.83
1928 Annual disc. chg.			2,380.89
1929 Unamortized disc.			
on bonds redeemed			
Prior to date of final			
Redemption date 7/1/29			10,412.50
1929 Disc. Jan. 1, Mch. 31			590.61
1929 " Apr. 1, May 14			376.24
1929 Bonds redeemed			
Apr. 17, 1929	25,000.00	650,000.00	
Apr. 25, 1929	2,000.00	648,000.00	
May 1, 1929	3,000.00	645,000.00	
May 14, 1929	144,000.00	501,000.00	
July 1, 1929	501,000.00	—0—	

L. MANUEL HENDLER, ETC., APPELLEE.

95

DATE OF BOND REDEMPTION

Sept. 15, 1926	15,000.00	
Sept. 18, 1926	1,000.00	
Sept. 20, 1926	2,000.00	18,000.00
Oct. 31, 1928		7,000.00
Apr. 17, 1929	25,000.00	
Apr. 25, 1929	2,000.00	
May 1, 1929	3,000.00	
May 14, 1929	144,000.00	174,000.00
July 1, 1929		501,000.00
Total bonds issued		<u>700,000.00</u>

Page 25

EXHIBIT "G"

AMORTIZATION OF BOND DISCOUNT

Year ended 12/31/29

Unamortized Bond Discount Jan. 1, 1929 41,345.72

Less

Monthly charges

January	196.87	
February	196.87	
March	196.87	590.61.
April	98.43	
April	95.23	193.66
May	94.51	
May	73.45	167.96
June		146.91
July		146.91
August		146.91
September		146.91
October		146.91
November		146.91
December		146.91
		<u>1,389.99</u>

Unamortized discount December 31, 1929

39,365.12

EXHIBIT "H"

AMORTIZATION OF BOND EXPENSE

Year ended 12/31/29

Balance

Unamortized Bond Expense Jan. 1, 1929

10,751.30

Less

Monthly charges

January	51.19		10,700.00
February	51.19		10,648.92
March	51.19	153.57	10,597.73
April	24.70		
April	24.52	49.22	10,548.51
May	24.30		
May	18.00	42.30	10,506.21
June		38.00	10,468.21
July		38.00	10,430.21
August		38.00	10,392.21
September		38.00	10,354.21
October		38.00	10,316.21
November		38.00	10,278.21
December		38.00	10,240.21

STATEMENT OF TOTAL TAX LIABILITY.

Year	Tax Previously Assessed	Deficiency	Correct Tax Liability
1929	—0—	11,852.09	11,852.09

EXHIBIT "H"

Protest dated June 8, 1931, to the report of the Internal Revenue Agent in charge, dated March 31, 1931, filed by Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated).

UNITED STATES TREASURY DEPARTMENT

INTERNAL REVENUE AGENT IN CHARGE

Baltimore, Md.

In the Matter of Federal Income Tax Liability of

CREAMERIES, INCORPORATED

(Formerly Hendler Creamery Company, Incorporated)

For the Year 1929

Protest Against Agent's Report

Dated March 31, 1931

Sir:

The undersigned, Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), hereby protests the findings, hereinafter specified, contained in the Revenue Agent's report dated March 31, 1931, a copy of which was mailed by you under date of May 11, 1931.

The taxpayer was a corporation organized under the laws of the State of Maryland on August 10, 1926, which had its principal place of business at 1100 Block East Baltimore Street, Baltimore, Maryland. On June 25, 1929, the name of the company was changed from Hendler Creamery Company, Incorporated, to Creameries, Incorporated, and on August 5, 1930, the corporation was dissolved. The year involved, as stated above, and the amount of additional tax proposed by the Agent are as follows:

Year	Additional Tax
1929	\$11,852.09

The schedule of findings to which exception is taken, and the statement of the grounds upon which such protest is based are hereinafter stated.

Point I

Schedule 2 (e)—Unamortized Discount.....	\$40,755.11
Schedule 2 (h)—Premium on Bonds Retired.....	\$26,569.40

The Agent has disallowed as deductions from income the above items with the explanation that such disallowance was being made for the reason that the bond indebtedness was assumed by The Borden Company, and that such unamortized bond discount and premium followed the bond issue.

The contention of the taxpayer, relying upon Article 68 of Regulations 64, is that the unamortized bond discount and the premium on bonds retired in 1929 constituted an expense for that year deductible by the taxpayer even though, pursuant to contract, the money for the return of the bonds was actually furnished by another corporation, to wit: The Borden Company. However, since bonds of the par value of \$174,000 were converted into preferred stock shortly prior to the redemption of the remaining bonds, it is conceded, under the authority of IT 2347, CB June 1927, page 86, that the taxpayer loses the benefit of the deduction of that part of the unamortized bond discount applicable to such of the bonds as were converted. The amount of such unamortized bond discount was \$10,412.50. Accordingly, the amount of unamortized bond discount to which the taxpayer is entitled should be reduced from \$40,755.11, as originally claimed, to \$30,342.61.

Under date of April 16, 1929, a preliminary contract was made for the purchase by The Borden Company of all of the assets and business of Hendler Creamery Company, which, with its subsidiaries, was engaged in the creamery and ice cream business in and about the city of Baltimore. At that time Hendler Creamery Company had outstanding common stock, preferred stock, prior preference stock and first mortgage bonds, which bonds had a total par value of \$675,000. These bonds were secured by a mortgage made to Commonwealth Bank of Baltimore, as Trustee, the mortgage covering certain property of Hendler Creamery Company. The bonds had been issued at a discount, and they contained a provision that if redeemed prior to their due date, the bondholders would be entitled to payment at the rate of 107½ per cent. In this preliminary contract the consideration agreed to be paid by The Borden Company included sufficient cash to take care of the redemption of the Prior Preference Stock, it being understood that the holders of such Prior Prefer-

ence Stock would be given an opportunity to exchange their holdings for stock of The Borden Company and that those unwilling to make such exchange would be entitled to receive cash. The consideration also included a certain number of shares of the capital stock of The Borden Company to be distributed ratably to the common and preferred stockholders. As is usual in a case of such "statutory reorganizations," provisions was further made that The Borden Company would take over the assets of the vendor company "subject to all liabilities of your Company and of its subsidiaries as they exist at the date of closing of this transaction," with certain exceptions not herein material.

No specific mention was made of the assumption of the bonded indebtedness of Hendler Creamery Company, and the clause set off in quotation marks above is all that was contained in the preliminary contract with reference to the liabilities of the vendor company, including its liability on the bonds.

On May 21, 1929, a formal contract was entered into between Hendler Creamery Company and The Borden Company, carrying out in the main the provisions of the preliminary contract above referred to. As to the liabilities of the vendor company, this contract, under Section Second provided as follows:

"You shall effect a reorganization so that in exchange for the assignment, transfer and conveyance to us of your said assets and business and, should we so elect, of the assets and businesses of the subsidiary companies, or any of them, we will:

(c) Assume and agree to pay all indebtedness and liabilities whatsoever of your Company and of the said subsidiary companies as the same shall exist at closing of title to us hereunder."

No other provision is contained in the contract with reference to the assumption by The Borden Company of the vendor company's liability on its outstanding bonds. However, under Section THIRD of the contract Hendler Creamery Company agreed to take "all such proceedings as shall be necessary to call your outstanding first mortgage six per cent. convertible gold bonds for redemption on July 1, 1929, "and the vendor company agreed to

cause the necessary resolutions calling the first mortgage bonds for redemption to be adopted and also to see that the first mortgage securing the bonds was duly satisfied before the closing of the contract.

The indenture under which the bonds were issued contained the following provision with respect to their redemption:

"Section 2. Whenever the Company shall elect to redeem any bonds, it shall in each case give notice of such redemption by publication at least once a week for four successive calendar weeks (in each instance upon any day of the week) prior to the interest payment date on which such redemption is to be made, the first publication to be made not less than thirty days nor more than sixty days prior to the date fixed for redemption, in one daily newspaper of general circulation, published in the City of Baltimore, State of Maryland, stating such election on the part of the Company, the redemption date and the redemption price, and stating that the interest on the bonds to be redeemed will cease to accrue on such redemption date and requiring that on said date such bonds be presented in negotiable form for redemption at the principal office of the Trustee in the City of Baltimore, State of Maryland."

The resolution calling for the redemption of the bonds was adopted by the Board of Directors of Hendler Creamery Company. The call for redemption was issued by and in the name of Hendler Creamery Company. The Hendler Creamery Company arranged for the discharge of the lien of the mortgage. The redemption date was fixed by the Hendler Creamery Company as July 1, 1929. At the time of the closing of the contract, which took place on June 21, 1929, all acts and things necessary to redeem the bonds had been done, except that the necessary funds had not at that time been deposited with the Trustee nor, of course, turned over by the Trustee to the bondholders.

At the time the final contract was entered into it was contemplated that Hendler Creamery Company might have to increase its liabilities for certain purposes and provision was made that in such event the repayment of

such obligations would also be borne by The Borden Company. Among such additional obligations the following was mentioned under Section THIRD of the agreement: "Money borrowed and/or paid out by your company to purchase or redeem its First Mortgage Bonds." In other words, the way was open for the vendor company to raise sufficient funds to redeem its bonds without resort in the first instance to The Borden Company.

Shortly after the closing of the contract and prior to July 1, 1929, The Borden Company deposited with the Trustee sufficient funds to redeem the outstanding bonds. With that exception The Borden Company played no part in either calling the bonds for redemption or in redeeming them.

It is well settled under the Bureau practice that unamortized bond discount and premiums on bonds constitute deductible expenses for the year in which the bonds are redeemable or retired. This proposition is not disputed by the Revenue Agent. His position, as stated above, is that the deductions should be allowed to The Borden Company because it "assumed" the obligation, and not by the Hendler Creamery Company. This contention on the part of the Revenue Agent is, in our opinion, clearly untenable, as the following considerations will demonstrate.

The agreement by which The Borden Company assumed and agreed to pay the indebtedness and liabilities of Hendler Creamery Company did not in any way release Hendler Creamery Company from its obligation. The bondholders were in no sense parties to this agreement and they were, accordingly, not bound by it.

When The Borden Company deposited with the Trustee sufficient funds to redeem the bonds it simply provided the Hendler Creamery Company with the means of discharging an obligation of the Hendler Creamery Company. It cannot be seriously urged that the effect of such transaction was to make The Borden Company the obligor of the bonds. The bonds never became those of The Borden Company, but on the contrary were at all times the bonds of Hendler Creamery Company. It occasionally happens that by reason of agreement between them-

selves A pays the taxes on real estate owned by B. In such simple cases the Department has always ruled that the deduction for taxes paid must be taken by B and not by A. This simple analogy is applicable to our case.

In view of the above, it is respectfully submitted that the consolidated net income as determined by the Revenue Agent and shown under Schedule 1 of his report should be reduced with respect to the items of unamortized bond discount and premium on bonds, amounting in all to \$56,912.01.

CONCLUSION

In view of the above facts, it is contended that the Agent was in error in disallowing the items commented upon above. In the event that your office is not satisfied with the contentions as outlined in this brief, we would consider it a courtesy if an oral hearing could be granted to enable us to discuss this matter. Due notice of the time and place of such hearing should be sent to the office of the company.

Respectfully,

(Signed) L. MANUEL HENDLER.

Internal Revenue Agent in charge
Baltimore, Maryland

STATE OF MARYLAND }
COUNTY OF BALTIMORE } ss:

L. M. HENDLER, being duly sworn, deposes and says, that he was an officer at date of dissolution, to wit, President of Creameries, Incorporated, the taxpayer named in the foregoing protest; that he has read the protest and the facts stated therein are true to the best of his information and belief.

(Signed) L. MANUEL HENDLER.

Sworn to before me this
8th day of June, 1931.

(Signed) John W. Rogers,
Notary Public.

EXHIBIT "H-1"

Supplemental report of the Internal Revenue Agent in Charge dated November 23, 1931, of the 1929 Income Tax return of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated).

**TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
BALTIMORE, MD.**

November 23, 1931.

Creameries, Inc.,
1100 E. Baltimore Street,
Baltimore, Maryland.

Dear Sirs:

Please find enclosed copy of supplemental report resulting from further consideration of your tax liability for the year 1929, which is submitted for your information and files.

Kindly acknowledge receipt of this report on the enclosed form.

Yours very truly,
(Signed) E. E. HEARN,
Internal Revenue Agent in Charge.

G
Enc.

TABLE OF CONTENTS

SCHEDULE 1 to 3 inclusive.
Statement of Total Tax Liability.

SUMMARY

PRELIMINARY STATEMENT

Year	Additional Tax
1929	\$5,591.76

The principal causes of the additional tax are as follows:
Reduction of Loss Claimed on Obsolete Equipment.
Disallowance of Organization Expenses as a deduction.

Findings have been discussed with Mr. R. M. Dodds, representing the Borden Company and Mr. J. D. Brauner, Assistant Treasurer of the Hendler Creamery Co., who on behalf of the taxpayer now approve the report as submitted herewith and have Form 870 executed to the findings.

CREAMERIES, INC.

SCHEDULE 1.

COMPUTATION OF AMENDED CONSOLIDATED NET TAXABLE INCOME

THIS REPORT	January 1 March 31	April 1st June 21st	June 21st December 31st	Total year 1929
Hendler Creamery Co., Inc. (Old)	(72,657.03)	93,663.34	None	21,006.31
Clover Ice Cream Co.	(4,877.74)		None	(4,877.74)
Horn Ice Cream Co., Inc.		31,744.93	None	31,744.93
Supreme Ice Cream Co., Inc.		5,094.36	None	5,094.36
TOTAL	77,534.77	130,502.63	None	52,967.86
ORIGINAL REPORT				
Hendler Creamery Co., Inc. (Old)	(15,744.02)	93,663.34	None	77,913.32
Clover Ice Cream Co.	(4,877.74)		None	(4,877.74)
Horn Ice Cream Co., Inc.		31,744.93	None	31,744.93
Supreme Ice Cream Co., Inc.		5,094.36	None	5,094.36
TOTAL	(20,622.76)	130,502.63	None	109,879.87

Continued

SCHEDULE NO. 2.
NET INCOME

CREAMERIES, INC.

Net income as disclosed by Original Report
As corrected

YEAR ENDED Dec. 31, 1929.
(15,745.02)
(72,667.03)

Net adjustment

UNALLOWABLE DEDUCTIONS AND ADDITIONAL INCOME:

NONTAXABLE INCOME AND ADDITIONAL DEDUCTIONS:

- (a) Unamortized Discounts
(b) Premium on Bonds retired

Net adjustment as above

TOTAL None
30,342.61
26,569.40
TOTAL 56,912.01
56,912.01

SCHEDULE NO. 2-A

EXPLANATION OF ITEMS—CHANGED

- (a) Unamortized discount as claimed as a deduction in the return (See Exhibit "F",
of Original Report for detail)

Less unamortized discount on bonds exchanged for capital stock. See Item E of
Schedule of Original report and Exhibit "F" of the Original report

Balance of unamortized discount on bonds retired for cash and now allowed as a
deduction

- (b) Premium on bonds retired for cash allowed as a deduction to vendor

40,755.11
10,412.50
30,342.61
26,569.40

CREAMERIES, INC.

SCHEDULE NO. 3

COMPUTATION OF TAX

Year ended Dec. 31, 1929.

Net income for taxable year	\$52,967.86
Net loss for 1928	2,133.64
Net Income	\$50,834.22
Income Tax 11 percent	5,591.76
TOTAL TAX ASSESSABLE	5,591.76
TAX PREVIOUSLY ASSESSED	NONE
Additional tax to be assessed	5,591.76

STATEMENT OF TOTAL TAX LIABILITY

Year	Deficiency	Correct Tax Liability
1929	\$5,591.86	5,591.76

EXHIBIT "I"

Letter of the Commissioner of Internal Revenue dated June 4, 1932, revising the Tax Liability of Creameries, Incorporated for the year 1929, asserting a deficiency in the amount of \$58,772.72.

TREASURY DEPARTMENT
WASHINGTON

June 4, 1932.

Creameries, Incorporated,
1100 East Baltimore Street,
Baltimore, Maryland.

Sirs:

You are advised that the determination of your tax liability and that of your affiliated companies for the year 1929 discloses a deficiency of \$58,772.72 as shown in the statement which is attached to and made a part of this letter.

In accordance with section 272 of the Revenue Act of 1928 and Article 16 of Regulations 75 relating to consolidated returns of affiliated corporations prescribed under Section 141(b) of the Revenue Act of 1928, notice is here-

by given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability and that of your affiliated companies.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, which ever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.

By J. C. Wilmer,
Deputy Commissioner.

Enclosures:

Statement:

Form 882

Form 870-C-29

Schedule 1 and 2.

IT:AR:C-5

JRK-60D

Returns Examined

Parent Company:

Creameries, Incorporated,
Baltimore, Maryland

Form	Year
1120	1929

Subsidiary Companies:

The Clover Ice Cream Company,
Baltimore, Maryland

1122	1929
------	------

Supreme Ice Cream Company,
Baltimore, Maryland

1122	1929
------	------

Horn Ice Cream Company,
Baltimore, Maryland

1122	1929
------	------

Tax Liability

Tax liability of Creameries, Incorporated, and each subsidiary company above named as provided for in Article 15(a) of Regulations 75, prescribed under Section 141(b) of the Revenue Act of 1928.

Year	Tax Liability	Tax Assessed	Deficiency
1929	\$64,364.48	\$5,591.76	\$58,772.72

In accordance with article 16(a) of Regulations 75, the deficiency will be assessed severally against each corporation named above.

The deficiency shown herein is based upon the report dated September 25, 1931 prepared by Revenue Agent Albert Bauer, and transmitted to you under date of November 23, 1931, which report is made a part hereof, and upon such adjustments as are shown in the attached schedules numbered 1 and 2.

In the determination of this deficiency careful consideration was given to the statements made by your representatives in conference at Washington, D. C., on May 23, 1932.

Creameries, Incorporated Year ended December 31, 1929

Schedule 1**Net Income**

Net income as disclosed by revenue agent's report, dated September 25, 1931	\$52,967.86
As corrected	587,265.26
Net adjustment	\$534,297.40
Unallowable deduction and additional income:	
(a) Gain from sale of assets	\$534,297.40
Total	\$534,297.40

Explanation of Item Changed

(a) Taxable gain recognized in accordance with Section 112 of the Revenue Act of 1928.

Computation

Amount realized from sale of assets in accordance with
Section 111 of the Revenue Act of 1928:

Sale price

Stock of the Borden Company

105, 306 shares at \$80.00

\$8,424,480.00

Cash

577,719.27

Total sale price

\$9,002,199.27

Net assets sold as shown in the statement
attached to return

2,393,485.62

Gain realized from sale

\$6,608,712.65

Taxable gain realized:

Total sale price

\$9,002,199.27

Amount distributed to stockholders:

105, 306 shares Borden Company

stock at \$80.00

\$8,424,480.00

Cash

43,421.87 8,467,901.87

Taxable gain recognized

\$ 534,297.40

Nontaxable gain:

Gain realized from sale

\$6,608,713.65

Gain recognized

534,297.40

Nontaxable gain

\$6,074,416.25

Schedule 2**Computation of Tax****Income Tax**

Net income for taxable year

\$587,265.26

Less:

Net loss (Section 141, Act of 1928)

2,133.64

Net income

\$585,131.62

Balance subject to tax

\$585,131.62

Income tax 11%

\$ 64,364.48

Total tax assessable

\$ 64,364.48

Total previously assessed

5,591.76

Additional tax to be assessed

\$ 58,772.72

EXHIBIT "M"

Letter from Commissioner of Internal Revenue to L. Manuel Hendler dated Febraury 3, 1935, advising that the protest filed by L. Manuel Hendler was denied.

TREASURY DEPARTMENT.

Washington.

February 3, 1933.

IT:AR:C-5-311

JBK-60D.

Mr. Joseph Addison
806 Mercantile Trust Building
Baltimore, Maryland

Sir:

There is enclosed a carbon copy of a letter of this date addressed to the taxpayer whose name and address are given below. This copy is furnished in accordance with the authority conferred upon you by the taxpayer to whom the original letter has been mailed.

Respectfully,

J. C. WILMER,
Deputy Commissioner.

By (signed) Charles P. Suman,
Chief of Section.

Enclosure:

Copy of letter.

Name and address of taxpayer Mr. L. Manuel Hendler
913 Lake Drive
Baltimore, Maryland

February 3, 1933.

IT:AS:C-5-311

JRK-60D

Mr. L. Manuel Hendler,
913 Lake Drive,
Baltimore, Maryland.

Sir:

You are advised that the determination of the income tax liability, of Creameries, Incorporated (formerly

Hendler Creamery Company, Incorporated), 1100 East Baltimore Street, Baltimore, Maryland, for the year 1929 discloses a deficiency in tax of \$58,772.72, as shown by the attached statement and accompanying schedules, which deficiency plus interest as provided by law, it is proposed to *assets* against you as transferee of said corporation, in accordance with the provisions of section 311 of the Revenue Act of 1928.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner.

By W. T. Sherwood.

Enclosures:

Statement

Form 870

Schedules 1 and 2

LB-3

Mr. L. Manuel Hendler, Transferee
Baltimore, Maryland

STATEMENT

IT:AR:C-5-311

JRK-60D

Returns Examined

Parent Company	Year	Form
Creameries, Incorporated, Transferor, Baltimore, Maryland	1929	1120
Subsidiary Companies		
The Clover Ice Cream Company Baltimore, Maryland	1929	1122
Supreme Ice Cream Company, Baltimore, Maryland	1929	1122
Horn Ice Cream Company, Baltimore, Maryland	1929	1122

Liability for Income Taxes

Mr. L. Manuel Hendler, Transferee,
Baltimore, Md.

Year	Amount
1929	\$58,772.72

The records of this office indicate that Creameries, Incorporated, has been dissolved and a proposition of its assets have been transferred to you on or about June 21, 1929.

The above-mentioned amount represents your liability under section 311 of the Revenue Act of 1928 as a transferee of the assets of Creameries, Incorporated, Baltimore, Maryland, for a deficiency of income taxes due from Creameries, Incorporated, for the year 1929.

The deficiency is based upon the report dated September 25, 1931, prepared by Revenue Agent Albert Bauer and transmitted to Creameries, Incorporated, on November 23, 1931, which report is made a part hereof, and upon such adjustments as are shown in the accompanying schedules 1 and 2.

A protest filed by your representative under date of October 27, 1932, in connection with a preliminary notice mailed you on August 29, 1932, was given careful consideration at conferences with your representatives in this office on November 23, 1932, and January 9, 1933.

It is noted that the entire deficiency has been allocated to you as the principal stockholder. This is in accordance with a verbal agreement with your representative at the conference on January 9, 1933 and in lieu of a pro-rata of the deficiency on the basis of stockholdings at the date of liquidation, on or about June 21, 1929, as proposed in the preliminary notice mentioned above.

LB-3

Mr. L. Manuel Hendler, Transferee

Creameries, Incorporated, Transferor

Year ended December 31, 1929.

Schedule 1.

Net Income.

Net income as disclosed by revenue agent's
report, dated September 25, 1931

\$52,967.86

As corrected

587,265.26

Net adjustment

\$534,297.40

Unallowable deduction and additional income:

(a) Gain from sale of assets \$534,297.40

Total

\$534,297.40

Explanation of Item Changed.

(a) Taxable gain recognized in accordance with section
112 of the Revenue Act of 1928.

Computation.

Amount realized from sale of assets in accordance with
section 111 of the Revenue Act of 1928:

Sale price:

Stock of the Borden Company 105,306 shares at \$80.00	\$8,424,480.00
Cash	577,719.27

Total sale price \$9,002,199.27

Net assets sold as shown in the statement attached to return 2,393,485.62

Gain realized from sale \$6,608,712.65

Total gain recognized:

Total sale price \$9,002,199.27

Amount distributed to stockholders:

105,306 shares Borden Company stock at \$80.00	\$8,424,480.00
Cash	43,421.87
	<u>8,467,901.87</u>

Taxable gain recognized \$534,297.40

RLS-3

Nontaxable gain:

Gain realized from sale \$6,608,713.65
Gain recognized 534,297.40

Nontaxable gain 6,074,416.25

Schedule 2.

Computation of Tax.

Income Tax.

Net Income for taxable year \$587,263.26

Less:

Net loss (section 141, Act of 1928) 2,133.64

Net income \$585,131.62

Balance subject to tax 585,131.62

Income tax at 11% 64,364.48

Total tax assessable 64,364.48

Total previously assessed 5,591.76

Additional tax to be assessed \$58,772.72

RIS-3

RECEIPT FOR PAYMENT OF TAXES.

ORIGINAL.

Form 1—Revised Feb. 1926.

Treasury Department.

Internal Revenue Service.

Income

Class of Tax

Collector's Office.....

District of.....

(Description of collection: tax;

at..... Date.....

interest: or offer in compromise;

(Name and Address of Taxpayer)..... etc.)

L. Manuel Hendler

913 Lake Drive,

Tax \$58,772.72

Baltimore, Md.

Interest 10,781.97

(Period covered)

Amount \$69,554.69

(Stamped)—

PAID

Received payment,

Apr. 15, 1933

Collector of Internal Revenue.

EXHIBIT "N"

Claim for refund filed by L. Manuel Hendler, filed August 30, 1933.

CLAIM

Form 843
TREASURY DEPARTMENT
Internal Revenue
Service
Revised June 1930

To be filed with the Collector
where assessment was made
or tax paid

The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ **X Refund of Tax Illegally Collected.**
Refund of Amount paid for Stamps Unused, or Used
in Error or excess.

Abatement of Tax Assessed (not applicable to estate
or income taxes).

State of Maryland SS:
City of Baltimore

Name of Taxpayer or

Purchaser of Stamps L. MANUEL HENDLER,
Transferee of Creameries, Inc. (formerly Hendler
Creamery Co., Inc.)

Business address 1100 E. Baltimore Street, Balti-
more, Md.

Residence 913 Lake Drive, Baltimore, Maryland.

The deponent, being duly sworn according to law, de-
poses and says that this statement is made on behalf of
the taxpayer named, and that the facts given below are
true and complete:

1. District in which return (if any) was filed Maryland.
2. Period (if for income tax, make separate form for
each taxable year) from January 1, 1929, to December
31st, 1929.
3. Character of assessment or tax Additional assess-
ment-income tax.

4. Amount of assessment, \$58,772.72; dates of payment Apr. 15, '33.
5. ———Interest paid on above assessment \$10,781.97.
6. Amount to be refunded \$58,772.72. \$10,781.97.
7. ———Interest paid \$10,781.97. \$10,781.97.
8. The time within which this claim may be legally filed expires under Section 322 of the Revenue Act of 1928 on April 15, '35.

The deponent verily believes that this claim should be allowed for the following reasons:

(Attach letter size sheets if space is not sufficient)

Sworn to and subscribed before me this

.....day of....., 193

Signed L. MANUEL HENDLER,

Transferee of Creameries, Inc.

(formerly Hendler Creamery Co., Inc.)

Signature of officer administering oath.

SEE INSTRUCTIONS ON REVERSE SIDE

The deponent verily believes that this claim should be allowed for the following reasons:—

(1) The deficiency in tax and interest thereon for which this claim for refund is filed arises out of an alleged liability of the taxpayer, L. Manuel Hendler, under Section 311 of the Revenue Act of 1928, as a transferee of the assets of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), 1100 E. Baltimore Street, Baltimore, Maryland, for an alleged deficiency in tax due from Creameries, Incorporated, for the year 1929, as disclosed in a letter from the Commissioner of Internal Revenue addressed to the taxpayer, dated February 3, 1933 (IT: AEC-5-311, JBK-60 D).

(2) The above deficiency assessed against the taxpayer herein and paid by him on April 15, 1933, was based upon the determination and adjustment made therein, contained in a letter from the Commissioner and transmitted to Creameries, Incorporated, dated June 4, 1932 (IT:C:P-7), which said determination and adjustments includes the sum of \$534,297.50 as income for the year 1929 of Creameries, Incorporated. The alleged income of Creameries, Incorporated for the year 1929 of \$534,297.50 represents the cash equivalent of the bonded indebtedness of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), assumed by The Borden Company under the terms and provisions of a contract of reorganization between said Company and Hendler Creamery Company, Incorporated, and asserted to have been received by Creameries, Incorporated as "other property" in pursuance of a plan of reorganization, resulting in an alleged taxable gain under Section 112 of the Revenue Act of 1928.

(3) The taxpayer as transferee of the assets of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), denies any liability under Section 311 of the Revenue Act of 1928, arising out of the aforesaid alleged taxable gain recognized in accordance with Section 112 (d), (2) of the Revenue Act of 1928 and asserted to be due by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), because the inclusion in its income for the year 1929 of the cash equivalent of the bonded indebtedness of said corporation was erroneous.

(4) Under the terms and provisions of the aforesaid contract between The Borden Company and Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), which provided for a plan of reorganization, all that Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), actually received or was entitled to receive for its assets and for the assumption of its bonded indebtedness by The Borden Company was stock of The Borden Company and cash for the redemption of its prior preference stock, which said cash was distributed in pursuance of the aforesaid plan of reorganization.

All that Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), had to transfer was its net asset value and all it got for that net asset value was stock in The Borden Company and cash which was distributed to Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), stockholders in pursuance of the plan of reorganization.

(5) The transaction was an exchange of property, in pursuance of a plan of reorganization, by a corporation, a party to the reorganization, solely for stock in another corporation a party to the reorganization and for money distributed in pursuance of the plan of reorganization.

It is, therefore, respectfully submitted that the transaction upon which the alleged deficiency is asserted, resulted in no taxable gain under Section 112 (b), (4) and (d), (1) of the Revenue Act of 1928, notwithstanding the assumption of the aforesaid bonded indebtedness and the assessment of the aforesaid tax plus interest thereon against the taxpayer, as transferee, was erroneous and the within claim for refund should be allowed in full.

(6) Otherwise stated the Commissioner is in error in considering the bonded indebtedness assumed by The Borden Company in a reorganization under Section 112 of the Revenue Act of 1928 as "other property" received by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), and not distributed in pursuance of the plan of reorganization.

(7) A brief containing further detailed reasons in support of and supplementing this claim for refund will be filed subsequently.

EXHIBIT "O"

Tentative notice of disallowance of claim for refund
filed by L. Manuel Hendler, dated December 2, 1933.

TREASURY DEPARTMENT

Washington

IT:AR:C

JRK

December 2, 1933.

Mr. Joseph Addison,
806 Mercantile Trust Building,
Baltimore, Maryland.

Sir:

There is enclosed a carbon copy of a letter of this date
addressed to the taxpayer whose name and address are
given below. This copy is furnished in accordance with
the authority conferred upon you by the taxpayer to
whom the original letter has been mailed.

Respectfully,

J. C. WILMER,
Deputy Commissioner.

By (Signed) P. H. Sherwood,
Chief of Section.

Enclosure:

Copy of letter

Name and address of taxpayer Mr. L. Manuel Hendler,
1100 East Baltimore Street
Baltimore, Maryland

IT:AR:C-5

JRK

December 2, 1933.

Mr. L. Manuel Hendler,
1100 East Baltimore Street,
Baltimore, Maryland.

Sir:

Reference is made to your claim for refund, as trans-
feree of Creameries, Incorporated (formerly Hendler
Creamery Company), in the amount of \$69,554.69 income
taxes for the taxable year 1929.

It is noted that your claim is based upon the contention
that the income of Creameries, Incorporated for the tax-
able year 1929 should be decreased by \$534,297.50 on the
grounds that the contract of reorganization between

Hendler Creamery Company and The Borden Company provided merely for an exchange of stock and resulted in no taxable gain to Hendler Creamery Company.

The records of this office indicate that your contention was discussed with your representative at Washington, D. C., prior to assessment of the tax in question and was disallowed on the basis of facts and data then before the Income Tax Unit.

A comparison of the statements in your claim with the facts and data mentioned above discloses that no new evidence has been presented in support of your contention.

For the foregoing reasons it is proposed to disallow your claim.

Should you desire to present any additional statements of facts, a brief should be executed in triplicate, under oath, and contain, the name and address of the taxpayer; the designation by date and symbols of the letter advising of the proposed disallowance of your claim; the designation of the year involved; an itemized schedule of the findings to which the taxpayer takes exception; a summary of the grounds upon which the taxpayer relies in connection with each exception, setting forth details of facts, figures, and all material evidence available to taxpayer. Your brief should also contain a statement as to whether or not you desire a hearing and should be filed with the Commissioner of Internal Revenue, Washington, D. C.

Careful consideration will be given your brief and you will be advised of the determination of the Income Tax Unit. If your contentions are not conceded and you have requested a hearing, you will be advised relative thereto.

If no response is received within thirty days from the date of this letter, your claim will be disallowed. Official notice will be issued by registered mail in accordance with Section 1103(a) of the Revenue Act of 1932.

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.

By (Signed) H. B. Robinson,
Head of Division.

EXHIBIT "P"

Further notice of disallowance of claim for refund filed by L. Manuel Hendler, dated March 26, 1934.

TREASURY DEPARTMENT

Washington

IF:AR:C-5

JRK

March 26, 1934.

Mr. William R. Semans,
Mercantile Trust Building,
Baltimore, Maryland.

Sir:

There is inclosed a carbon copy of a letter of this date addressed to the taxpayer whose name and address are given below. This copy is furnished in accordance with the authority conferred upon you by the taxpayer to whom the original letter has been mailed.

Respectfully,

CHAS. T. RUSSELL,

Deputy Commissioner.

By P. H. Sherwood,
Chief of Section.

Enclosure:

Copy of letter:

Name and address L. Manuel Hendler, Transferee of
Creameries, Inc., Baltimore, Maryland.

of taxpayer Year 1929.

March 26, 1934.

IT:AR:C-5

JRK

Mr. L. Manuel Hendler,
1100 East Baltimore Street,
Baltimore, Maryland.

Sir:

Reference is made to your claim for refund, as transferee of Creameries, Incorporated (formerly Hendler

Creamery Company), in the amount of \$69,554.69, income taxes for the taxable year 1929.

Your claim is based upon the contention that the taxable net income of Creameries, Incorporated, for the calendar year 1929 should be decreased by \$534,297.50 on the ground that the contract of reorganization between Hendler Creamery Company and The Borden Company provided merely for an exchange of stock and resulted in no taxable gain to Hendler Creamery Company.

The Bureau holds that there was constructive receipt of \$534,297.40 in cash, in addition to the stock received, and that the taxpayer is liable for a taxable gain on the disposition of its assets to the extent of the cash received, in accordance with Section 112(d)(2) of the Revenue Act of 1928.

For the foregoing reasons, your claim will be disallowed. Official notice of the disallowance of your claim will be issued by registered mail in accordance with Section 1103 (a) of the Revenue Act of 1932.

Respectfully,

CHARLES T. RUSSELL,

Deputy Commissioner.

By (Signed) H. B. Robinson.

Head of Division.

EXHIBIT "R"

Certified copies of tentative and final income tax returns of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), for calendar year 1929, filed March 6th, 1930 and June 6, 1930, respectively.

CREAMERIES, INC.

(Formerly Hendler Creamery Co., Inc.)

Summary of Prorated Net Income Transferred from Returns of Hendler Creamery Co., Inc., Supreme Ice Cream Co., Inc., and Horn Ice Cream Co. Inc., included in the return of The Borden Company, and subsidiaries; shown in Item 10 (a) page 1 of Return.

Hendler Creamery Company, Inc.,	\$ 78,403.31
Supreme Ice Cream Company, Inc.	3,889.88
Horn Ice Cream Company, Inc.	27,031.88
Total	<u>\$109,325.07</u>

CREAMERIES, INC.

(Formerly Hendler Creamery Co., Inc.)

Statement Regarding Transfer of Net Assets in Reorganization and Dissolution of Company.

The net assets of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) and its subsidiaries, namely, Supreme Ice Cream Company, and the Horn Ice Cream Company and its subsidiary, the Clover Ice Cream Company, pursuant to a plan of reorganization from which no taxable gain or deductible loss results to the company as set forth in Section 112 of the Revenue Act of 1928, were exchanged for 86,716 shares of common stock of The Borden Company, 350 Madison Avenue, New York, New York, and such shares of common stock were issued to the stockholders as a distribution in liquidation of this company.

The effective date of acquisition by The Borden Company of the assets of these companies, was April 1, 1929, but, the actual closing title date of such acquisition was June 21, 1929.

New companies, known as Hendler Creamery Company, Inc., Supreme Ice Cream Company, Inc., and Horn Ice Cream Company, Inc., were organized by The Borden Company to take over the assets of the old companies mentioned above, and by bookkeeping entries the net income of the old companies from the effective date of acquisition to the actual date of closing title was transferred to the books of the new companies.

It is recognized, however, due to Regulations and Decisions governing the reporting of taxable net income of a vendor corporation, the taxable net income to be reported by these corporations should include the operating net income up to the actual date of closing title. Therefore, the net operating income between the effective date of acquisition, April 1, 1929, and the actual closing title date, June 21, 1929 (prorated on the basis of the number of days between the effective date and actual closing title date, as they bear to the entire period of operating net income, as shown by the books of the new companies), has been included in item 10 (a) on page 1 of return. Schedules covering the new companies showing how this proration of income is arrived at are appended hereto.

The transfer of net assets in reorganization on April 1, 1929, follows:

Assets:

Cash	\$202,062.24
Notes Receivable	33,635.46
Accounts Receivable	104,662.16
Inventories	95,992.76
Investments	40,350.00
Deferred and Suspended Assets	40,876.68
Capital Assets, less Depreciation Reserve	2,219,747.49
Other Assets	8,096.37
Goodwill	867,503.72
	<hr/>
	\$3,612,926.88

Less Liabilities:

Notes Payable	\$1,050,000.00	
Accounts Payable	130,410.78	
Accrued Expenses	39,030.48	1,219,441.26
		<u>\$2,393,485.62</u>

Less:

Redemption of Bonds	\$668,000.00	
Retirement of 1st Preferred 7% Stock	1,250,100.00	1,918,100.00
		<u></u>

Net Assets transferred to The Borden Company in exchange for 86,716 shares of Common Stock \$475,385.62

The 86,716 shares of common stock of The Borden Company were issued to the stockholders as a distribution in liquidation of this company. The net worth of this company at the time of distribution follows:

Capital Stock:

Preferred Stock	\$ 20,000.00
Common Stock	30,000.00
Surplus	493,608.09
	<u>\$543,608.09</u>

Less:

Unamortized Discount and Expense on Bond issue	\$40,755.11	
Organization expense of Supreme Ice Cream Company, company now in process of dissolution	27,467.36	68,222.47
		<u></u>

Net Worth \$475,385.62

Net Worth, April 1, 1929 \$475,385.62

Plus:

Income reported in item 10 (a) page 1 of return 109,352.07

Distribution in liquidation:

Preferred Stock	\$20,000.00	
Common Stock	30,000.00	
Amount as shown in item		
16 (c) page 3 of return	534,710.69	<u>\$584,710.69</u>

Creameries, Inc. (formerly Hendler Creamery Company, Inc.) and its subsidiaries, are in process of dissolution. A list of stockholders showing the number of shares of stock held by each in Creameries, Inc., and the number of shares of stock of The Borden Company distributed to each is attached hereto.

CREAMERIES, INC.*(Formerly Hendler Creamery Co., Inc.)*

Name and Address	Number of Shares held in Creameries, Inc. (for- merly Hendler Creamery Co., Inc.)		Number of shares of The Borden Company distrib- uted in liquidation
	Common	Preferred	Common
L. Manuel Hendler, 1710 Eutaw Place,	24,650	16,667	71,656
Nathan Lebovitz 813 Lake Drive	1,250	833	3,612
Mrs. Rose Hendler 1710 Eutaw Place	1,500	1,000	4,335
Louis Hendler 26th & Market Streets Wilmington, Delaware	250	167	723
Michael Hendler 26th & Market Streets Wilmington, Delaware	500	333	1,444
B. R. Hendler 2523 Reisterstown Rd. Baltimore, Maryland	1,025	683	2,962
Harry Hendler 2523 Reisterstown Rd. Baltimore, Maryland	250	167	723

Irvin D. Baxter 2452 Eutaw Place	100	—	174
Adam Deupert 3612 St. Paul Street	200	—	347
C. C. Croggon 1127 Calvert Bldg.	50	—	87
Harry C. Cover 702 Brookwood Road	50	33	144
Harry A. Duke 3915 Boarman Avenue	50	33	144
John D. Brawner 3510 Edgewood Road	37	25	108
J. Arley Robison 2401 Oswego Avenue	25	17	73
Harry K. Bosch 1714 N. Appleton Street	25	17	73
Harry B. Siegmund 4109 Chatham Road	12	8	35
Daniel P. Banks, Jr. 1721 N. Calvert Street	13	9	39
John W. Rogers 2823 Baker Street	13	8	37
	<u>30,000</u>	<u>20,000</u>	<u>86,716</u>

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QUESTIONS

1. Did the corporation file a return under the above name for the preceding taxable year? **No** Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or business in existence during this or any prior year since December 31, 1917? **No** If answer is "yes," give name and address of each predecessor business, and the date of the change in entity. **Name of Corporation changed to Creameries, Inc., from Heller Creamery Co., Inc. June 25, 1929.**

2. Upon such change were any asset values increased or decreased? **No** If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

3. BASIS OF RETURN

7. Is this return made on the basis of actual receipts and disbursements? **No** If not, describe fully what other basis or method was used in computing net income. **AGGREGATE METHOD**

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock.

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the preparer should be placed on each separate schedule accompanying the return.

10. LIST OF ATTACHED SCHEDULES

11. PER INDEX ATTACHED

12. The corporation's books are in the hands of **Corporation** at **100 East Main St.,** **St. Louis, Mo.**

KIND OF BUSINESS

1. By means of the key letters given below, identify the corporation's main business-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, bee harvesting, etc., and also the raising of such property. State the product or products of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product.

B.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E.—Transportation—rail, water, boat, etc. State the kind and special product transported, if any. F.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; telegraph; or power. G.—Storage—without trading or profit from sales—(warehouses, stockyards, etc.). State product stored. H.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. I.—Sales with storage with profit primarily from sales. J.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. K.—Finance, including banking, real estate, insurance. L.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or lease their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E or F may own or control the source of their material or power; concerns in G may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answer:

(a) General class (use key letter designation) **C**

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent or commission; state if inactive or in liquidation)

4. In liquidation.

5. AFFILIATIONS WITH OTHER CORPORATIONS

6. In this a consolidated return of two or more corporations? **Yes**

7. If yes, present from the Collector of Internal Revenue for your district Form 551, Consolidated Return, which shall be filed in, among other, and filed as a part of this return.

8. The Articles 12 (a) and (d), Regulations 74.

Page 6 of Return SCREEN LIST OF MANUFACTURING OR PROCESSING CODES See Instruction 2

Item	Amount
Salaries and wages	16,985.97
Material and supplies	3,117.41
Maintenance	8,763.11
Water	180.75
Insurance	5,487.82
Light and Power	6,549.77
Miscellaneous	74.69
TOTAL	39,159.52

SCHEDULE B—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instructions 6)

[illegible]

State how property was acquired.

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 13)

1. NAME OF OFFICER	2. COMMA TIES	3. TIES DURING the Year	BALANCE OF BANK OVERS		4. Amount of Money to be drawn to
			4. Overdraw	5. Profitable	
L. M. Hendler	President	All			18,742.57
B. R. Hendler	Vice-President	"			782.50
N. Lebovitz	Treasurer	"			2,775.00
J. D. Branner	Asst. Treas.	"			100.00
John Dupont	Director	"			100.00
...	"	"			100.00
...	President	All			100.00

SCHEDULE E—TAXES PAID (See Instructions 1c)

1. Amount (Carry over from 10)	2. Amount (Carry over from 10)	3. Amount (Carry over from 10)
Salaries and wages	Vehicle Licenses	5,000.00
	Stock Transfer Stamps	5,000.00
	Real Estate and Personal Property	5,000.00
Included in Schedule "A"		

SCHEDULE F—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instructions 17)

[illegible]

State how property was acquired.

SCHEDULE C--BAD DEBTS (See Instruction 1f)

1. YEAR	2. SALES OF PROPERTY	3. REP. DUES	4. NAME OF CONTRIBUTOR	5. DEDUCTIONS	6. PAYMENTS
1935			Kraft Foods Chase Corp.	504.00	
1936					
1937					
1938					
1939		407.60			

SCHEDULE H—DIVIDENDS DEDUCTIBLE (See Instructions 10)

1. Year	2. Sales or Amount		3. Rate Dates		4. Name of Corporation	5. Amount of Dividends		
						6. Dividends	7. Payouts	8. Payouts
1935					Kraft Foods Cheese Corp.			
1936								
1937								
1938								
1939								
				407.60				

SCHEDULE 1—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 20)

[illegible]

AFFIDAVIT

AFFIDAVIT

W^e, the undersigned, president and treasurer of the corporation for which this return is made, being solemnly duly sworn each for himself that this return, including the accompanying schedules and statements, has been examined by him and is to the best of his knowledge and belief a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 and to the Regulations thereunder, and that

Given to and subscribed before me this 3rd day of June 1908

INTERNATIONAL
 SEAL

Signature of client (printing name) John P. Rogers

(Title) President

COMPANY NAME Sealed Air Corporation, Inc.

Problem Asst. Manager

Attached is separate sheet of copy of the above information.

Attends a separate court if any of the above subjects are not satisfied with the result of the trial.

CREAMERIES, INC. (FORMERLY HORNBY CREAMERY CO., INC.) AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEETS, JANUARY 1, 1929, AND APRIL 1, 1929

	JANUARY 1, 1929				APRIL 1, 1929			
	TOTAL	ELIMINATION	CREAMERIES, INC. (FORMERLY HORNBY CO., INC.)	CLOVER ICE CREAM COM- PANY	TOTAL	ELIMINATION	CREAMERIES, INC. (FORMERLY HORNBY CO., INC.)	SUPREME ICE CREAM COM- PANY
Assets:								
Cash	\$ 222,501.48		\$ 222,501.48	\$ 5,325.74	\$ 222,501.48		\$ 215,104.26	\$ 428.40
Accounts Receivable	22,224.22		22,224.22	440.00	22,224.22		21,433.27	1,428.17
Accounts Receivable	62,722.27		62,722.27	25,545.15	108,197.44		49,354.70	16,222.24
Reserve for Bad Debts	1,222.27		1,222.27		1,222.27		1,222.27	
Inventories:	61,222.00		61,222.00	25,545.15	104,222.15		47,212.42	16,222.24
Raw Materials and Supplies	41,224.21		41,224.21	5,345.22	77,274.21		27,222.22	2,222.22
Finished Goods	10,222.27		10,222.27		12,112.15		12,222.22	4,222.22
Investments:	32,722.42		32,722.42	5,345.22	27,222.72		40,222.24	7,222.24
Stocks of Domestic Corporations	32,422.00	302,212.27	322,222.27		30,222.00	1,022,000.00	1,022,222.00	
Bonds of Domestic Corporations	9,272.00		9,272.00		10,000.00		10,000.00	
Obligations of the United States								
Other Investments								
Deferred Charges:	42,222.00	302,212.27	342,741.27		40,222.00	1,022,000.00	1,222,222.00	
Prepaid Insurance	12,447.12		10,222.22	2,222.22	10,222.00		2,222.00	1,222.00
Prepaid Taxes	1,400.22		1,400.22	220.22	2,222.22		2,222.22	222.22
Other	2,222.22		2,222.22		22,222.27		22,222.27	122.00
Capital Assets:	12,442.22		12,442.22	2,212.22	40,222.22		22,222.22	4,212.12
Land	100,200.00		100,200.00		144,222.22		100,200.00	2,222.22
Buildings	247,722.22		247,722.22		272,222.22		242,222.22	22,222.22
Machinery and Equipment	722,222.22		722,222.22	42,222.22	722,222.22		722,222.22	40,222.22
Mechanical Refrigerators	22,222.12		22,222.12	22,222.12	22,222.22		22,222.22	22,222.22
Furniture and Fixtures	22,222.22		22,222.22		22,222.12		22,222.22	2,222.22
Delivery Equipment	272,222.22		272,222.22	2,222.22	272,222.22		272,222.22	22,222.22
Buses, Cams, Tubs, etc.					122,222.22		122,222.22	17,222.22
Reserve for Depreciation	1,774,222.22	1,222,277.17	147,747.22	3,022,222.22	1,222,222.22	1,222,222.22	1,222,222.22	222,222.22
Other Assets:	222,222.22		222,222.22	72,222.22	222,222.22		222,222.22	222,222.22
Surrender Value of Life Insurance	2,222.22		2,222.22		2,222.22		2,222.22	
Organization Expense	22,222.22		22,222.22		22,222.22		22,222.22	
Bond Discount and Expense	22,222.22		22,222.22		22,222.22		22,222.22	
Goodwill	22,222.22		22,222.22		22,222.22		22,222.22	
TOTAL ASSETS	\$2,212,107.22	\$202,000.00	\$2,222,222.22	\$212,222.22	\$2,222,222.22	\$1,222,000.00	\$2,222,222.22	\$272,222.22

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CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO., INC.) AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEETS, JANUARY 1, 1929 AND APRIL 1, 1929

	JANUARY 1, 1929				APRIL 1, 1929							
	TOTAL	ELIMINATION	CREAMERIES, INC. (FORMERLY HENDLER ICE CREAMERY CO., INC.)	CLOVER ICE CREAM COM- PANY.	TOTAL	ELIMINATION	CREAMERIES, INC. (FORMERLY HENDLER ICE CREAMERY CO., INC.)	SUPREME ICE CREAM COM- PANY	TOTAL HORN ICE CREAM COMPANY	ELIMINATION	CLOVER ICE CREAM COM- PANY.	HORN ICE CREAM COMPANY
LIABILITIES												
Notes Payable	\$	\$	\$	\$	\$1,080,000.00	\$ 886,500.00	\$1,080,000.00	\$886,500.00	\$ 880,000.00	\$	\$	\$ 880,000.00
Accounts Payable	105,506.75		88,644.98	14,841.85	130,410.78		109,055.91	17,353.24	4,081.83		618.10	3,405.73
Mortgages Payable	675,000.00		675,000.00		668,000.00		668,000.00					
Accrued Expenses:					15,788.00		15,788.00					
Interest					19,758.41		18,641.44	1,078.97				
Taxes					5,344.07		5,340.17	100.97	314.93		188.85	186.60
Other	3,318.65		2,597.86	721.39								
	3,318.65		2,597.86	721.39	39,030.48		37,537.61	1,177.84	314.93		188.85	186.60
Other Liabilities:												
Reserve for Contingencies	35,000.00		35,000.00									
Reserve for Bond Discount, etc.	51,986.60		51,986.60									
	86,986.60		86,986.60									
Capital Stock:												
Preferred Stock	1,045,000.00		1,045,000.00		1,270,100.00		1,270,100.00		500,000.00	300,000.00	300,000.00	500,000.00
Common Stock	30,000.00	300,000.00	30,000.00	300,000.00	30,000.00	301,000.00	30,000.00	1,000.00	500,000.00	300,000.00	300,000.00	500,000.00
	1,075,000.00	300,000.00	1,075,000.00	300,000.00	1,300,100.00	301,000.00	1,300,100.00	1,000.00	500,000.00	300,000.00	300,000.00	500,000.00
Surplus	366,295.81		365,457.48	2,838.33	465,606.09	300,000.00	378,371.13	45,085.45	370,153.51		21,063.51	349,090.00
TOTAL LIABILITIES	\$2,310,107.81	\$300,000.00	\$2,291,706.26	\$518,401.55	\$3,561,149.35	\$1,657,500.00	\$3,543,064.65	\$271,094.45	\$1,824,490.27	\$300,000.00	\$321,807.86	\$1,502,682.41

* Balance Sheet, April 1, 1929 immediately prior to transfer of Net Assets in reorganization.

EXHIBIT "S"

Minutes of special meeting of Board of Directors of Hendler Creamery Company, Incorporated, held June 17, 1929.

HENDLER CREAMERY CO., INC.

HENDLER CREAMERY COMPANY, INCORPORATED

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS

A special meeting of the Board of Directors of Hendler Creamery Company, Incorporated, was held at the offices of the company, 1100 East Baltimore Street, Baltimore, Maryland, on the 17th day of June, 1929, at two o'clock in the noon, pursuant to waiver.

The following directors were present:

Messrs. L. M. Hendler, B. R. Hendler, Cover, Brawner and Lebovitz, constituting a quorum.

The president of the company, Mr. L. Manuel Hendler, presided, and Mr. Nathan Lebovitz, the secretary of the company, acted as secretary of the meeting.

The president advised the board that the contract between this company and the Borden Company authorized at meetings of the directors and stockholders held on May 21, 1929, had been executed and delivered, and that it was expected that the transaction would be closed on June 21, 1929. That under the terms of the contract, this company was entitled to eighty-six thousand seven hundred and sixteen (86,716) shares of stock of the Borden Company, and that by resolutions adopted by this board and by the stockholders at the meetings held on May 21, 1929, this company was to be liquidated and the preferred and common stock under said resolutions was to be treated as equal, share per share. He further advised that the Borden Company had agreed to assume all liabilities of this company except those certain liabilities mentioned in the contract with which this board is familiar.

The secretary then presented to the meeting a list of the preferred and common stockholders of the company as of this date, showing their respective holdings of stock as follows:

STOCKHOLDERS	PREFERRED	COMMON
L. Manuel Hendler	16,667	24,650
Nathan Lebovitz	833	1,250
Mrs. Rose Hendler	1,000	1,500
Louis Hendler	167	250
Michael Hendler	333	500
B. R. Hendler	683	1,025
Harry Hendler	167	250
Harry C. Cover	33	50
Harry A. Duke	33	50
John D. Brawner	25	37
J. Arley Robison	17	25
Harry K. Bosch	17	25
Harry B. Siegmund	8	12
Daniel F. Banks, Jr.	9	13
John W. Rogers	8	13

Irvin D. Baxter, 100 shares common; Adam Deupert, 200 shares common; C. C. Croggon, 50 shares common.

The secretary further reported that the holders of the preferred and common stock had all deposited their stock with him, to be held by the company and to assure the payment of the liquidation dividend to those entitled thereto. The secretary further reported that it was found that upon liquidation and equal distribution each share of the preferred and common stock of this company would be entitled to 1.73432 shares of The Borden Company stock, and that it was impossible to have the Borden Company stock issued in fractional shares the stockholders had agreed among themselves on a distribution in the nearest number of whole shares, and the secretary filed with the meeting an agreement signed by all of the stockholders setting forth the agreed distribution of the Borden Company stock.

Thereupon on motion duly made and seconded it was unanimously

RESOLVED that the company be liquidated by distributing to the stockholders of record as of this date the eighty-six thousand seven hundred and sixteen (86,716) shares of the Borden Company stock to which this company is entitled under the contract with The Borden Company, and that in accordance with the agreement of the stockholders the distribution shall be as follows:

NAME OF STOCKHOLDER	PREFERRED STOCK	COMMON STOCK	BORDEN STOCK
L. Manuel Hendler	16,667	24,650	71,656
Nathan Lebovitz	833	1,250	3,612
Mrs. Rose Hendler	1,000	1,500	4,335
Louis Hendler	167	250	723
Michael Hendler	323	500	1,444
B. R. Hendler	683	1,025	2,962
Harry Hendler	167	250	723
Irvin D. Baxter	....	100	174
Adam Deupert	....	200	347
C. C. Croggon	....	50	87
Harry C. Cover	33	50	144
Harry A. Duke	33	50	144
John D. Brawner	25	37	108
J. Arley Robison	17	25	73
Harry K. Bosch	17	25	73
Harry B. Siegmund	8	12	35
Daniel F. Banks, Jr.	9	13	39
John W. Rogers	8	13	37
	20,000	30,000	86,716

Thereupon motion duly made and seconded the following resolution was unanimously adopted:—

RESOLVED that the above named stockholders of this company shall agree prior to the time of receiving The Borden Company stock that they will in the proportion that the Borden Stock received by them bears to the total of eighty-six thousand, seven hundred and sixteen (86,716) shares of Borden stock assume and pay when legally due and demandable all of the liabilities of this company not assumed and paid by The Borden Company.

Upon motion duly made and seconded, a salary of five hundred dollars was declared payable to each director for services from January 1 to June 20, 1929.

There being no further business before the meeting, the meeting was adjourned.

NATHAN LEBOVITZ,
Secretary.

EXHIBIT "T"

Consent waiver, Form No. 870, executed by Creameries, incorporated, agreeing to immediate assessment of Deficiency Tax for calendar year, 1929.
Form 870

Treasury Department
Internal Revenue Service
Revised February, 1931

**WAIVER OF RESTRICTIONS ON ASSESSMENT
AND COLLECTION OF DEFICIENCY IN TAX.**

Pursuant to the provisions of Section 274(d) of the Revenue Act of 1926, and/or Section 272(d) of the Revenue Act of 1928, the undersigned taxpayer waives the restrictions provided in Section 274(a) of the Revenue Act of 1926, and/or Section 272(a) of the Revenue Act of 1928, and consents to the assessment and collection of a deficiency in income tax for

The calendar year ended December 31, 1929 in the sum of \$5,591.76 together with interest thereon as provided by law.

(SEAL)

CREAMERIES, INCORPORATED
(formerly Hendler Creamery Company, Inc.)

Name

1100 block East Baltimore Street,
Baltimore, Maryland

Address

By L. Manuel Hendler,
President at date of dissolution.

Date September 29, 1931.

Note: This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 606 of the Revenue Act of 1928, but its execution and filing at the address shown in the accompanying letter will expedite the adjustment of your income tax liability as indicated above.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal, if any, of the corporation must be affixed.

EXHIBIT "U"

Agreement between the Borden Company and L. Manuel Hendler and Nathan Lebovitz, dated April 16, 1929.

April 16th, 1929.

Messrs. L. Manuel Hendler
and
Nathan Lebovitz

Dear Sirs:

We hereby make you the following offer:

1. It is our understanding and you represent to us:

(a) That you own more than 90% of the outstanding Common Stock of Hendler Creamery Company, Incorporated, a corporation duly organized and existing under the laws of the State of Maryland (hereinafter called "your Company"), and more than 90% of the outstanding Preferred Stock of said Company, and control more than 20% of the outstanding Prior Preference Stock of said Company.

(b) The Company has an authorized capital stock consisting of 30,000 shares of Common Stock without par value, 20,000 shares of Preferred Stock without par value and 30,000 shares of Prior Preference Stock of the par value of \$100 each. All of the said authorized Common Stock and Preferred Stock is outstanding and 12,600 shares of Prior Preference Stock is outstanding. The Prior Preference Stock is subject to redemption on 30 days notice at 107½ plus accrued dividends, on any dividend date, the dividend dates being January 1st, April 1st, July 1st and October 1st, in each year. The Prior Preference Stock carries cumulative dividends at the rate of 7% per annum.

The Company has three wholly owned subsidiaries, namely, the Clover Ice Cream Company, the Horn Ice Cream Company, and the Supreme Ice Cream Company; the entire outstanding capital stock of the latter company having recently been acquired by your Company for 2,350 shares of the Prior Preference Stock of your Company. The Horn Ice Cream Company has recently acquired the Baltimore plant and the Baltimore business of Southern Dairies, Inc., including inventories and accounts receivable, for approximately the sum of \$1,166,000.00 in cash.

All of the said wholly owned subsidiary companies are duly organized Maryland corporations.

Your Company has no bonds, mortgages or funded debt authorized or outstanding, except \$675,000 principal amount of First Mortgage 6% Convertible Twenty Year Gold Bonds issued under a mortgage dated July 1, 1926, made to Commonwealth Bank of Baltimore, as Trustee, to secure an authorized issue of \$1,000,000 of said bonds. These bonds are convertible, par for par, into Prior Preference Stock of your Company. Such conversion may be effected at any time prior to maturity, or, if the bonds be called for redemption, at any time before the date of the adoption of proper resolutions for the call of said bonds. Said bonds are subject to redemption on any interest payment date, on 30 days' previous notice, at 107½% of their principal amount plus accrued interest if redeemed on or prior to December 31, 1929. The interest dates on said bonds are January 1st and July 1st in each year.

(c) You have submitted to us balance sheets of your Company and of each of its subsidiary companies as of December 31, 1928, and profit and loss accounts of your Company, of the Horn Ice Cream Company or its predecessors in title and of the Supreme Ice Cream Company, for the calendar years 1926, 1927 and 1928; and profit and loss account of the Clover Ice Cream Company for the last eleven months of 1928. Said balance sheets correctly represent the financial condition of your Company and of its subsidiaries and/or their predecessors in title as of December 31, 1928 and said profit and loss accounts correctly represent the results of their operations for the periods covered thereby.

2. We hereby offer to purchase and you by your acceptance hereof agree to cause your Company to effect a reorganization pursuant to which it will sell, convey and transfer to us all its assets and business, of every kind and wheresoever located, including all the assets and business of its subsidiary companies, subject to all liabilities of your Company and of its subsidiaries as they exist at the date of closing of this transaction, but excepting liability for capital stock, tax liabilities accruing by reason of the sale to us and/or by reason of any business transacted by your Company or its subsidiaries subsequent to the date of the conveyance of the said assets and

business to us, and excepting additional income and/or excess profits taxes now or hereafter imposed upon your Company or its subsidiary companies in respect of business transacted and/or income accrued prior to January 1, 1929, and excepting also the legal fees of your counsel and counsel for your Company and its subsidiaries, in connection with this contract and the transfer hereby provided, all of which excepted liabilities are to be paid by you.

In consideration of the sale and conveyance to us of your Company's said assets and business, we agree:

(a) To provide for the liquidation of the said shares of your Company's Prior Preference Stock (plus such shares thereof as may be issued after the date hereof upon conversion of the said First Mortgage Bonds) at the option of the holders thereof, either (1) by the issuance to or upon the order of such holders of Prior Preference Stock as elect to receive the same, two shares of our full paid and non-assessable Capital Stock, of the par value of \$50 for each three shares of your Prior Preference Stock; or (2) as to all other holders of your Prior Preference Stock, by payment of the sum of \$107.50 per share thereof in cash plus accrued dividends thereon. In the event of the holders of said Prior Preference Stock neither availing themselves of their opportunity to exchange the same nor to sell the same, we are to make available to your Company by proper escrow the necessary funds, to wit, \$107.50 per share, together with accrued dividends, in order to redeem said shares not so exchanged or sold. It is understood that all of the said Prior Preference Stock shall be called for redemption on July 1, 1929. No fractional shares of our stock will be issued.

(b) To issue to or upon the order of your Company 43,358 shares of our full paid and non-assessable Capital Stock of the par value of \$50 per share.

Provided, however, that if prior to the closing of this transaction the par value of the shares of our stock is reduced from \$50 each to \$25 each, as is now contemplated, the amounts thereof to be issued in accordance with the preceding paragraphs (a) and (b) shall be correspondingly adjusted, namely, four shares of our stock, of the par value of \$25 shall be issued for each three shares of

your Prior Preference Stock under clause (1) of paragraph (a); and 86,716 shares of our stock of the par value of \$25 each, shall be issued under said paragraph (b). In either event the shares of our stock shall be listed on the New York Stock Exchange.

3. We shall notify you as soon as practicable after the date hereof whether the Haskins & Sells' audit hereinafter provided for, verifies the financial statements referred to in Clause (c) of paragraph One hereof, and whether our counsel approves the title of the real estate owned by your Company and its subsidiaries and the proceedings taken for the organization of said Companies and the issuance of their capital stock, it being understood that you will promptly furnish us with all title searches and other papers, books and documents as we may reasonably request.

Upon receipt of such notice, and not later than May 21st, 1929, you will cause your Company to adopt proper resolutions calling the said First Mortgage Bonds and the said Prior Preference Stock for redemption on July 1, 1929, and will mail to the holders of your Prior Preference Stock notice of redemption thereof together with notice of their option as set forth in sub-division (a) of Section two hereof.

It is a condition of our obligation hereunder that the said First Mortgage Bonds and Prior Preference Stock be called for redemption on July 1, 1929.

4. This offer and your acceptance hereof are subject as follows:

(a) To the verification by an audit of your books and accounts, to be made at our expense by Messrs. Haskins & Sells, of your financial statements referred to in Clause (c) of paragraph 1 hereof.

(b) To the satisfactory working out of all legal details, including without limiting the generality of the foregoing, the approval by our counsel of the regularity and sufficiency of the proceedings for the organization of your Company and its subsidiary companies and the issuance of its and their outstanding stock, of the regularity and sufficiency of the action taken by the stockholders and directors of your Company and its subsidiary companies in

connection with the authorization and performance of the agreement between us and of the titles of your Company and its subsidiaries to the properties owned by them respectfully and of the form and sufficiency of all instruments of conveyance and other instruments and agreements required by the terms hereof.

5. It is understood and agreed that a suitable formal contract, containing the detailed terms and provisions applicable to this transaction will be prepared and executed by us and by you, or, at our option, by your Company as soon as conveniently possible. Without prejudice to any other provision to be contained in such formal contract, it is understood that in addition to the matters referred to above, the same shall contain provisions substantially to the following effect, all of which are hereby agreed to by you:

(a) That the assets conveyed to us by your Company shall include all property, real and personal, tangible and intangible, owned by your Company, and its subsidiaries, wheresoever situate, all patents, patent rights, trademarks, trade names and good will and the exclusive right to do business under the present corporate names of your Company and its subsidiaries, and the business of said companies as going concerns;

(b) That the business of your Company and Clover Ice Cream Company since December 31, 1928, and the business of Horn Ice Cream Company and Supreme Ice Cream Company since your Company acquired the same, has been and until the closing of this transaction will be conducted in the ordinary normal course and that there has been and will be no change in the condition or value of your Company or any of its subsidiaries since the respective dates above mentioned except in the normal course of business and except money borrowed and paid and stock issued in the purchase of the stock of the Supreme Ice Cream Company and the Baltimore plant of Southern Dairies, Inc., and money borrowed by your Company to redeem its First Mortgage Bonds, and except that the assets of Clover Ice Cream Company may at your option be conveyed to the Horn Ice Cream Company.

(c) That since December 31, 1928, no dividend has been and until the closing of this transaction no dividend will be paid or declared on the outstanding capital stock of

your Company, except the regular dividend on its Prior Preference Stock at the regular dates therefor;

(d) That your Company and its subsidiaries are not and at the date of the closing of this transaction will not be parties to any contracts, express or implied, except such contracts as have been or will be made in the usual course of business.

(e) That if prior to the closing of this transaction any question of more than ordinary importance shall arise in connection with the conduct of the business of your Company, we shall be consulted in respect thereof before a decision is reached or action taken thereon.

(f) That you shall upon the closing of this transaction deliver to us your several agreements, whereby you shall undertake that for a period of five years you will not directly or indirectly engage or be interested in any competitive business in the States of Maryland and Delaware or in any other territory where the business of your Company and its subsidiaries is now being conducted.

(g) That you and such other officers and employees of your Company and its subsidiaries as we may desire shall upon the closing of this transaction deliver to us their several agreements whereby they will enter the service of and accept employment from our Company or one of our subsidiaries for a period of at least one year, at salaries mutually satisfactory.

(h) That you shall guarantee (1) correctness of the balance sheets of your Company and Clover Ice Cream Co. submitted to us as above stated subject only to such changes as shall have occurred subsequently to the dates of said balance sheets in the ordinary normal course of business and to such changes as are set forth in sub-division (b) of Section 5 hereof, (2) that the amount of the liabilities shown on the balance sheet of Supreme Ice Cream Company on December 31, 1928, submitted to us are correct and (3) that there have been and will be no change in the condition or value of Horn Ice Cream Company and/or Supreme Ice Cream Company since the respective dates when your Company acquired the same to the date of the closing of this transaction except only such changes as shall have occurred during said period in the ordinary normal course of business.

(i) That your Company shall cooperate with us in such manner as may reasonably be required to permit the organization by us of a new corporation or corporations, with names similar to or identical with the names of your Company and its subsidiaries and the qualification of such new corporation or corporations in all jurisdiction where your Company and/or its subsidiaries does business; that upon the closing of this transaction your Company and its subsidiaries will be dissolved and liquidated as soon as conveniently possible, the proceedings in that connection to be taken by your counsel but under the supervision of Messrs. Master & Nichols.

(j) That neither your Company nor any of its subsidiaries is or at the closing of this transaction will be a party to any suit or litigation, except the usual so-called "accident suits" and that such accident suits, if any, are sufficiently covered by insurance and will be handled by responsible insurers, except you carry no insurance on claims arising from presence of foreign matter in your products.

(k) That all properties owned by your Company and its subsidiaries which are insurable against loss by fire are and at the closing of this transaction will be covered by fire insurance written by responsible insurers in amounts sufficient to prevent liability for co-insurance.

6. It is contemplated that this transaction will be closed at our office, No. 350 Madison Avenue, New York City, not later than June 21, 1929; provided that either you or we shall be entitled to a reasonable adjournment beyond that date to complete preparations for closing.

If the foregoing correctly states the understanding between us, please sign the acceptance at the end hereof and this letter and your said acceptance will then constitute the agreement between us, pending the preparation and execution of the more formal contract above mentioned.

Very truly yours,

THE BORDEN COMPANY.

By (Sgd.) Arthur W. Milburn,
President.

ACCEPTED: April 16th, 1929.

(Sgd.) L. Manuel Hendler.

(Sgd.) Nathan Lebovitz.

L. MANUEL HENDLER.

NATHAN LEBOVITZ.

Thereupon plaintiff, L. MANUEL HENDLER, took the stand as a witness of lawful age, who, after first being duly sworn, was examined and testified as follows:

That he now resides in Baltimore, Maryland, where he has lived since April, 1929. That he is a director of the Borden Company. That in April, 1929, he was president of Hendler Creamery Company and its subsidiaries. That when Creameries, Inc., income tax of approximately \$69,000 was assessed against him as transferee, it was paid to Galen E. Tait, then Collector of Internal Revenue. That Galen L. Tait was not in office when this suit was brought in July, 1934. That after consummation of the transaction between Creameries, Inc., and the Borden Company in June, 1929, he continued to be associated with the Borden Company in charge of the Southeastern Division, which contained all companies originally comprising the old Hendler Company and its subsidiaries, plus one or two small companies taken over since. That at the time of the transaction of June 21, 1929, he was the largest stockholder of Hendler Creameries, Inc., and received the largest block of Borden stock, which he still retains.

Whereupon to further sustain the issues on his part, plaintiff called NATHAN L. LEBOVITZ, a witness of lawful age, who, after being duly sworn, was examined and testified as follows:

That he is Vice President and Secretary of Hendler Creamery Company. That in April, 1929, he was Vice President and Secretary of the old Hendler Creamery Company. That after consummation of the transaction between the Borden Company and Hendler Creamery Company, he continued to be and still is associated with the Borden Company. The Borden Company organized a new corporation known as the Hendler Creamery Company. That prior to April, 1929, and also on May 21, 1929, the Borden Company's capital structure consisted only of common stock and the company had no funded indebtedness. That the right of Hendler bondholders to exercise their conversion privilege and to exchange their bonds for prior preferred stocks had ceased the day before the meeting of the Board of Directors calling the bonds for redemption, which was on May 14, 1929.

Whereupon Mr. Russell, of counsel, on behalf of the defendant, moved that the testimony of the witness relating to whether the right of Hendler bondholders to convert their bonds into Prior Preference Stock had ceased before the meeting of the Board of Directors on May 14, 1929, be stricken out in that the question was one of law which should be brought out not by the opinion of the witness, but by the particular contracts.

To which the Court replied, "If there is a controversy about it it will have to be proven legally. If there is no controversy about it I think it quite unnecessary to take the time and expand the record by putting in a lot of papers about an issue which does not exist. With that understanding I overrule the objection," to which ruling of the Court counsel of the defendant duly excepted.

Whereupon to further sustain the issues on his behalf, plaintiff introduced a certain instrument in writing, dated June 21, 1929, designated "chattel deed" intended to convey all of its assets and executed by Hendler Creamery Company, Inc., and the Borden Company, which document was thereupon designated as plaintiff's "Exhibit Lebovitz 1" and received into evidence. Said exhibit is set forth herein, in so far as relevant to this appeal, in haec verba, to wit:

PLAINTIFF'S EXHIBIT LEOVITZ NO. 1.

THIS CHATTEL DEED, made this 21st day of June, 1929 by and between HENDLER CREAMERY COMPANY, INCORPORATED, hereinafter sometimes termed the "Seller", first party, and THE BORDEN COMPANY, hereinafter sometimes termed the "Purchaser", second party.

WITNESSETH:

WHEREAS, HENDLER CREAMERY COMPANY, INCORPORATED, a corporation organized and existing under and pursuant to the Laws of the State of Maryland, has heretofore agreed to sell and convey to THE BORDEN COMPANY, a corporation organized and existing under and pursuant to the Laws of the State of New Jer-

sey, all of the property, assets, rights, business and good will of the Seller of whatsoever kind and wheresoever situated, for the considerations and upon the terms and conditions set forth in a certain contract dated May 25, 1929, heretofore entered into between said The Borden Company and Hendler Creamery Company, Incorporated.

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar (\$1.00) lawful money of the United States to the Seller paid by the Purchaser, and for other good and valuable considerations, including Eighty-six thousand seven hundred and sixteen (86,716) shares of the full paid and non-assessable capital stock of said The Borden Company of the par value of \$25 each, receipt of which by the Seller is hereby acknowledged, the Seller does hereby grant, sell, assign, transfer, deliver, convey and set over unto the Purchaser and to its successors and assigns, as of the day of the date of this agreement, all of the property, assets, rights, business and good will of the Seller of whatsoever kind and wheresoever situated, as provided in said contract of May 25, 1929.

The property, assets, rights and business of the Seller hereby transferred and conveyed include, among other things, all of the following (provided, however, that no specific enumeration or word of particular application herein contained shall in any way limit or impair the scope, intent or effect of any general description or word of general application herein contained), viz:

- A. (Here follows enumeration of properties, chattels, etc., conveyed).
- B. (Here follows enumeration of properties, chattels, etc., conveyed).
- C. (Here follows enumeration of properties, chattels, etc., conveyed).
- D. (Here follows enumeration of properties, chattels, etc., conveyed).
- E. (Here follows enumeration of properties, chattels, etc., conveyed).

F. All claims against the United States or any State or Municipal Government, or any officer, agent or employee thereof, for refund of taxes paid by the Seller of

its predecessors in interest; and the Seller covenants that it will execute and deliver to the Purchaser all such authorizations, powers of attorney and other papers as shall be necessary to enable the Purchaser to prosecute and to collect upon such claims:

G. (Here follows enumeration of properties, chattels, etc., conveyed).

H. (Here follows enumeration of properties, chattels, etc., conveyed).

I. All the business of the Seller as a going concern and all the good will and trade name thereof (including the exclusive right to do business under the names "Hendler Creamery Company, Incorporated," "The Horn Ice Cream Company", "The Supreme Ice Cream Company" and "The Clover Ice Cream Company"), and all rights, privileges, immunities and exemptions owned or used by the Seller which it has legal power to convey.

J. (Here follows enumeration of properties, chattels, etc., conveyed).

K. (Here follows enumeration of properties, chattels, etc., conveyed).

FIRST. The Seller hereby covenants, warrants and agrees that it has good and unencumbered title to the property and assets hereby sold, transferred, assigned and conveyed, and to each and every part thereof, and full right to sell, assign, transfer and convey the same, subject only to exceptions as are expressly set forth or permitted in said contract dated May 25, 1929 between the Purchaser and Seller and to no other exceptions whatsoever.

SECOND. The Seller further covenants and agrees to execute and deliver to the Purchaser, its successors and assigns, all such further or separate assignments, agreements, conveyances, transfers and other instruments that the Purchaser or its successors or assigns may at any time reasonably request for the better assuring to it or to them of the title to the said property and assets and all the right, title and interest of the Seller therein and thereto.

THIRD. It is the intention of the parties hereto that separate deeds for the real estate conveyed by the Seller to the purchaser shall be executed and delivered by the Seller and duly recorded; that assignments of all trademarks, patents, copyrights, leases, and all such other instruments and definitive bills of sale, which may be required to vest the title to the said properties and assets in the Purchaser, shall also be executed and delivered by the Seller to the Purchaser.

FOURTH. In consideration of the conveyance and transfer hereby above made, the Purchaser assumes and agrees to pay all the indebtedness and liabilities whatsoever of the Seller and of the several subsidiaries of the Seller whose assets and business shall be conveyed to the Purchaser pursuant to said contract of May 25, 1929, as the same exist immediately prior to the execution and delivery of this instrument. It is, however, expressly understood and agreed that the liabilities so assumed by the Purchaser do not and shall not include (1) any capital stock liability; (2) any income or excess profits taxes incurred by the Seller or by either or any of the said subsidiary companies, by reason of the conveyance of its assets and business to the Purchaser hereunder; (3) any tax incurred by the Seller or by any subsidiary company whose property and assets the purchaser elects to take in respect of business transacted by the Seller or by any such subsidiary company and/or income accrued to the Seller or to any subsidiary company subsequent to the execution and delivery of this instrument to the Purchaser; (4) any additional income and or excess profits taxes now or hereafter imposed upon the Seller or upon any subsidiary company in respect of business transacted and/or income accrued prior to January 1, 1928; or (5) the legal fees of counsel for the Seller and its subsidiaries in connection with the conveyance provided for by said contract of May 25, 1929, and the fees and expenses of the liquidating or redemption agent for the Prior Preference Stock of the Seller.

IN WITNESS WHEREOF, said Hendler Creamery Company, Incorporated, and said THE BORDEN COMPANY have caused their respective corporate seals to be hereto affixed, attested by their respective Secretaries or

Assistant Secretaries, and these presents to be subscribed with their respective corporate names by their proper officers thereto duly authorized, pursuant to due resolutions by their respective Boards of Directors, in duplicate counterparts, as of the twenty-first day of June, 1929.

HENDLER CREAMERY COMPANY,
INCORPORATED.

By L. MANUEL HENDLER, (Seal)
President.

In the Presence of:

GRENVILLE S. SEWALL.

Attest:

NATHAN A. LEBOVITZ,
Secretary.

THE BORDEN COMPANY.

By A. JOHNSTON,

Vice-President

(Seal).

Attest:

W. H. HEBMAN.

(2 ACKNOWLEDGMENTS HERE OMITTED).

Thereupon plaintiff's witness continued his testimony as follows, to wit:

That between May 21, 1929, and June 21, 1929, there was no change in the assets and liabilities of the Hendler Company other than those occurring in the ordinary course of business and during that time no money was borrowed by the corporation to be used for the purpose of paying off the Hendler bonded indebtedness. That no satisfaction piece was furnished by the Hendler Creamery Company to the Borden Company because the bonds were not paid off at the time of closing. That during the negotiations there was discussion of the possibility of delay in the closing date beyond July 1. That the Borden Company elected under the contract to take the assets instead of the stock of the wholly owned subsidiaries of the Hendler Creamery Company.

Whereupon in answer to an inquiry of the Court, counsel for plaintiff read into the record certain in-

formation taken from "Exhibit R," attached to the stipulation, said exhibit consisting of Creameries, Inc., income tax return for 1929, which showed a statement of liabilities as of April 1, 1929, the effective date of the acquisition of the assets of Creameries, Inc., by the Borden Company, said liabilities at that time consisting of the following:

Notes payable	\$1,050,000.
Accounts payable	130,410.78
First mortgage bonds	668,000.

That none of the liabilities assumed by the Borden Company were paid by Hendler Creamery Company, Inc., subsequently Creameries, Inc. That on July 1, 1929, the new Hendler Creamery Company, organized by the Borden Company, borrowed \$900,000 from local banks and paid \$1,050,000 of bank indebtedness existing at that time. That the new Hendler Company, to which the assets were conveyed, was incorporated on June 19, 1929. That the accounts payable would have been paid by the new Hendler Company in the ordinary course of business within thirty days. That after the conveyance from the old Hendler Company to the Borden Company, the new Hendler Company issued to the Borden Company its stock in exchange for the assets, including the cash, accounts receivable, etc., transferred by the old Hendler Company to the Borden Company.

Whereupon counsel for defendant cross-examined the witness, said Nathan L. Lebovitz, who testified further as follows, to wit:

That the old Hendler Creamery Company sold its first mortgage bonds in July, 1926, the amount of bonds so sold aggregating \$700,000, face value, and said company realized \$930 per \$1,000 bond.

Whereupon a statement entitled "Statement of Provision for Redemption of Bonds" was identified, introduced as plaintiff's "Exhibit No. 2" and received by the Court. Said exhibit is set forth in haec verba as follows, to wit:

PLAINTIFF'S EXHIBIT 2.**CREAMERIES, INC.**

Statement of Provision for Redemption of Bonds and Prior Preference Stock of Hendler Creamery Co. by The Borden Company.

(FIRST MORTGAGE BONDS)

Date		Par Value of Bonds Outstanding	Premium	Interest	Total Cash
	Principal amount of bonds converted into similar amount of prior preference stock	\$174,000.00			
May 24, 1929	Bought and held on account by Commonwealth Bank of Balto.	127,000.00	819.40	3,048.00	130,867.40
June 27, 1929	Cash advanced to trustee	345,000.00	25,875.00	10,350.00	381,225.00
June 27, 1929	Purchased from outsiders	22,000.00	125.00	330.00	22,205.00
	Treasury bonds	7,000.00			
		675,000.00	26,569.40 (A)	13,728.00 (B)	534,297.40

PRIOR PREFERENCE STOCK

	Prior Preference Stock	Stock of The Borden Co.	Cash
June 21, 1929	Cash advanced to Commonwealth Bank of Baltimore for adjustment of fractional shares exchanged and stock to be exchanged	13981 shrs.	18590 shrs. \$4,201.12
June 21, 1929	Cash for redemption	359 shrs.	39,220.75
		14340	18590 43,421.87

ALBERT BAUER,
Internal Revenue Agent.

Thereupon ALBERT BAUER, a witness of lawful age, after first being duly sworn, was examined on behalf of defendant, and testified as follows:

That his occupation was that of an Internal Revenue Agent of the Baltimore Division and that he had been employed in such capacity for sixteen years. That he is a certified public accountant and prepared the statement introduced into evidence and marked Plaintiff's Exhibit No. 2," said document having been attached to and forming a part of a second supplemental report dated May, 1932, in which the income tax liability of the Hendler Company was determined to the extent of approximately \$58,000 in excess of the sum previously assessed. That there was a total outstanding bonded indebtedness of \$675,000, par value, of which \$174,000 was converted into prior preference stock. That \$127,000 of the bonds were bought and held on account by the Commonwealth Bank of Baltimore on instructions of the Borden Company. That the bank notified the Borden Company they had the bonds in hand and the Borden Company sent a check to pay for them.

ALBERT BAUER.

Whereupon plaintiff's counsel, Mr. Semans, in reply to a question of the Court, stated for the purpose of the record that the bond transactions were handled in the following manner: At the time of the redemption of the bonds the Borden Company directed the Commonwealth Bank to take these bonds held for its account and cancel them. The Sharpless-Hendler Company, of Wilmington, Delaware, a wholly owned subsidiary of the Borden Company, owned \$22,000.00 of the Hendler Company bonds. The Borden Company purchased these bonds from the Sharpless-Hendler Company and delivered them to the Commonwealth Bank, as Trustee, for cancellation. The \$7,000.00 worth of Treasury bonds were bonds that were carried in the treasury of the old Hendler Creamery Company that they had bought from time to time on the open market during the year previous. They had been bought out of the general funds of the old Hendler Creamery Company as a matter of investment, and these bonds were transferred to the Borden Company, together with the other assets.

That on March 31, 1931, he rendered a report covering the calendar year 1929 of Creameries, Inc., proposing an additional liability of \$11,852.09, based on numerous adjustments such as organization expenses which are unallowable deductions and the disallowance of unamortized discount and premium on bonds. That a second report was prepared by him and submitted on September 25, 1931, recommending a decrease in the proposed additional tax liability from \$11,852.09 to \$5,591.76. That this adjustment, resulting in the decrease in the deficiency, was the result of a protest rendered by the taxpayer and a conference held in the office of the Revenue Agent in Charge, when the unamortized discount on the first mortgage bonds and the premium on bonds were allowed practically in their entirety, having previously been disallowed as proper deductions. That the unamortized discount thus allowed amounted to \$30,342.61 and the premium on bonds amounted to \$26,569.40. That at the conference in the Revenue Agent's office the following persons were present: R. M. Dodds, tax consultant for the Borden Company; a Mr. Aidt, Chief Accountant for Hendler; Mr. John D. Branner, Assistant Treasurer of Hendler Creamery Company; Dr. C. D. Hahn, the Government conferee, besides

himself. That the conference was held September 22, 1931, and the conference report was dated a few days later. That there were three major items contended by the taxpayer. That one of them was the disallowance of the unamortized discount, another was the disallowance of the premium as a deduction, and the other some organization expenses. The taxpayer presented a written form of protest contending that the bonds were never the obligation of the Borden Company at any time, but they were always the obligation of the Hendler Creamery Company. That in his first report he had contended these obligations were bond obligations and followed the assets when they were transferred in June and as such, when the obligation followed the assets, the unamortized discount and premium were not a deduction to the Hendler Creamery Company. That the taxpayer in his protest contended that he (Revenue Agent Bauer) was wrong and that these obligations were the obligations of the Hendler Company primarily finally and forever and they never were the obligations of the Borden Company. That this contention was confirmed in a verbal statement, though he did not recollect which one of the representatives made the statement. That the conferee, Dr. Hahn, decided that these obligations were those of the Hendler Company and not of the Borden Company and therefore were a proper deduction to the Hendler Company. That his report was amended in accordance with this decision and the tax liability accordingly reduced. That as the result of the second report, the unamortized discounts and premium were allowed as deductions and the same was closed as far as the Baltimore office was concerned by the taxpayer signing an agreement on Form 870 waiving restrictions as to the assessment. That he thought the Government sent the taxpayer a bill for the amount of the reduced deficiency and that he paid it. That in accordance with the usual custom a report of the conference, together with the petition of the taxpayer and the supplemental report of the agent, were sent on to Washington for final review. That the taxpayer did not receive a copy of the conference report. That the matters were reviewed by the Bureau at Washington, who came to the conclusion that there was an element of tax in the transaction to the extent of the cash that the Borden Company paid for the redemption of the Hendler mortgage bonds.

ALBERT BAUER.

That this thought originated entirely with Washington and he went to Washington and conferred on the matter and a second supplemental report was made in accordance with the recommendations originating in Washington. That this second supplemental report was dated May 20, 1932, and recommended an additional tax liability of \$58,772.72. That the taxpayer paid the reduced deficiency, to which he had consented, in the approximate sum of \$5,500, but that this was not a complete final assessment, being subject to review in Washington. That in the meantime the case was being reaudited in Washington and it was decided that the taxpayer owed \$58,000 more. That the Government is at liberty to reopen cases from time to time unless the taxpayer files Form 806, which is a final closing form as to all parties concerned, and of course providing there is not element of fraud in it. That Form 870, which was executed in this case, was not a final closing form.

Whereupon counsel for plaintiff cross-examined the witness, Albert Bauer, who testified further as follows, to wit:

That he could not definitely say who did the talking in the Revenue Agent's office, but that the Government representatives did not deal with Mr. Dodds as a representative of the Borden Company, because so far as the Government representatives were concerned, the taxpayer was the Hendler Creamery Company and they would only deal officially with a representative of that company. That he did not know if Mr. Dodds had a power of attorney filed. That he presumed he had, in connection with his examination and first report, copy of the first contract and other papers but he could not say he got all the information he asked for because he had considerable difficulty in trying to determine where the liability of the mortgage bonds lay. That he had a conference in New York and others in Baltimore and the matter seemed to enlighten itself at the conference. That the contentions made at the conference were the same contentions made in the protest. That to the best of his knowledge the verbal arguments were wholly in line with the written protest submitted. That the contentions made at the conference were the same contentions made in the protest. That everything is in the protest that was said either as a fact or as a legal argument at the conference. That the reduction

ALBERT BAUER:

in his second report from approximately \$11,000 to a deficiency of approximately \$5,500 was based entirely upon the conference and the protest. That he thought the opinion of Washington resulting in the additional tax of \$38,000 arose primarily from the matters filed by the taxpayer protesting the original \$11,000 tax liability in which the taxpayer stated that the bonds were always the liability of the Hendler Creamery Company. That at the time of the original examination it appeared that no one could really give a satisfactory answer as to the liability of the bond issue. That there seemed to be quite a difference of opinion and it was only when the petition was filed by the taxpayer that the Government representatives had some definite written statement of facts to work on. That he had several conferences trying to tie the taxpayer's representatives down on the question of where the liability on the bond issue lay. That he had a copy of the reorganization agreement, but when he read that, he was still in the air as to the fact. He knew the assets were transferred on June 21 but it was very vague about the mortgage.

Thereupon the plaintiff and defendant rested. The case having been closed by both parties, the following prayers were submitted by defendant:

EXCEPTION NO. I**DEFENDANT'S PRAYER NO. I**

"The defendant prays the Court to rule as a matter of law that the satisfaction and cancellation of \$494,000 face value bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) procured by the Borden Company at a cost of \$534,297.40 pursuant to an agreement between said corporations constituted part of the consideration for the acquisition of the assets of the former by the latter on, to wit, June 21, 1929, and is 'money or other property' received and not distributed by said Creameries, Inc., within the meaning of Section 112(d)(2) of the Revenue Act of 1928, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly accepted.

EXCEPTION NO. II**DEFENDANT'S PRAYER NO. II**

"The defendant prays the Court to rule as a matter of law that the promise or undertaking of the Borden Company to procure the satisfaction and cancellation of \$494,000 face value bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) which was effected in May and June, 1929, at a cost to said Borden Company of \$534,297.40 constituted part of the consideration for the acquisition of the assets of said Creameries, Inc., on, to wit, June 21, 1929, and is 'money or other property' received and not distributed by the latter corporation within the meaning of Section 112(d)(2) of the Revenue Act of 1928, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. III**DEFENDANT'S PRAYER NO. III**

"The defendant prays the Court to rule as a matter of law that the surrender for cancellation by the Borden Company to the Commonwealth Bank on, to wit, June 27, 1929, of \$149,000 face value of bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.), said bonds having been acquired in May and June, 1929, at a cost of \$153,072.40, including interest, pursuant to its promise or undertaking constituted money or other property received and not distributed by said Creameries, Inc., the obligor on the bonds as part of the consideration for the transfer of its assets to said Borden Company on, to wit, June 21, 1929."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. IV**DEFENDANT'S PRAYER NO. IV**

"The defendant prays the Court to rule as a matter of law that the payment of \$381,225 in cash by the Borden Company to the Commonwealth Bank to satisfy bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) of the face value of \$345,000, said bonds having been called for retirement at a price of 107½ plus interest, constituted money or other property received and not distributed by said Creameries, Inc., as part of the consideration for the conveyance of its assets to said Borden Company on, to wit, June 21, 1929."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. V**DEFENDANT'S PRAYER NO. V**

"The defendant prays the Court to rule as a matter of law that the plaintiff has failed to sustain his burden of proving that Creameries, Inc. (formerly Hendler Creamery Co., Inc.) was not taxable with respect to gains of not less than \$534,297.40 realized upon sale or other disposition of its assets to the Borden Company in 1929 pursuant to certain agreements between said corporations dated April 16, 1929, and May 21, 1929, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. VI**DEFENDANT'S PRAYER NO. VIII**

"In the event the Court holds that the sum of \$534,297.40 was improperly taxed to Creameries, Inc., as money or other property received in accordance with the provisions of Section 112(d)(2) of the

Revenue Act of 1928, the defendant prays the Court to rule as a matter of law that the entire gain of \$6,608,712.65 realized in 1929 by Creameries, Inc. upon sale or other disposition of its assets to the Borden Company was taxable income received by the former and not exempt from tax in that the consideration received by said Creameries, Inc., did not consist (a) solely of stock or securities within the meaning of Section 112(d)(4) of the Revenue Act of 1928, nor (b) of stock or securities and money or other property received and not distributed within the meaning of Section 112(d)(2) of the Revenue Act of 1928."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. VII

DEFENDANT'S PRAYER NO. IX.

"The defendant prays the Court to rule as a matter of law that the plaintiff is estopped from now claiming a different effect to the contracts and agreements between Creameries, Inc. (formerly Hendler Creamery Co., Inc.) and the Borden Company from that which he urged and contended for in his sworn protest of June 8, 1931, and which the representatives of said corporation urged at a conference with representatives of the Commissioner of Internal Revenue held in September, 1931, upon the basis of which protest and conference the Commissioner allowed deductions for unamortized discount and for premium upon bonds retired, reducing the proposed deficiency by \$6,260.33 and adopting the taxpayer's view so insistently urged that the bonded indebtedness of Creameries, Inc., was not assumed with other liabilities by Borden Company on, to wit, June 21, 1929, but was at the time of payment by the latter corporation the obligation of said Creameries, Inc., and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

The Court then, after argument by counsel for plaintiff and defendant, announced its rulings as follows:

EXCEPTION NO. VIII

"The outstanding liabilities of Hendler as of June 21, 1929, which were assumed by Borden, consisted of \$501,000 par value of first mortgage bonds which had been called for redemption on July 1, 1929; current bank loans in the amount of \$1,050,000; and merchandise accounts payable in the amount of \$130,410.78. . . ."

" . . . In closing the transaction before July 1, 1929, before the bonds were redeemable, and while they were still outstanding, Borden waived the requirement for satisfaction of the mortgage at the closing date and took the property subject to the bond issue, which then became one of the liabilities of Hendler assumed at the closing by Borden, just as it assumed the bank loans and current accounts payable; and Borden itself paid all of them within a month thereafter. . . ."

to which said rulings of the Court the defendant duly excepted.

EXCEPTION NO. IX

"First: As to 'Reorganization.' As a result of recent authoritative decisions, it is clear that the transaction was within the statutory definition of a 'reorganization.' . . ."

to which said ruling of the Court the defendant duly excepted.

EXCEPTION NO. X

"Second: As to the taxability of the item of \$534,297.40. In support of the taxability of this item the Government submits the broad contention that wherever, in a reorganization, the transferee corporation assumes liabilities of the transferor, such assumption of liabilities constitutes the receipt by the transferring corporation of 'other property or money' which when not distributed to stockholders of the transferring corporation, is therefore taxable despite the provisions of 112(d). This contention is, I think, untenable. . . ."

" * * * Furthermore the contention now advanced is contrary to the administrative practice for more than ten years, under the statutes so worded and several times reenacted. * * * "

to which said rulings of the Court the defendant duly excepted.

EXCEPTION NO. XI

" * * * It seems quite unreasonable to suppose that 'property' in this context includes an assumption of liability, which in ordinary thought and speech does not have these characteristics.

"Apart from the literal meaning of the section, the assumption of liabilities in this case was not within the substantial import of the statute. In financial substance Hendler merely exchanged its equity in its property for shares of stock in the Borden Company which represented only the equity therein, and which pro tanto were diminished in value by the Hendler liabilities assumed by Borden. Neither in form nor substance did Hendler receive any 'other property or money' by Borden's assumption of Hendler's liabilities."

to which said ruling of the Court the defendant duly excepted.

EXCEPTION NO. XII

"There is no lexicological difficulty involved in including creditors within the scope of 'distribute' as used in the section under consideration. It might possibly be considered inapt to use the word if the distribution were limited to creditors only, because 'distribute to creditors' is such a familiar phrase in bankruptcy and insolvency, where it most often implies something less than payment in full. But there is no linguistic infelicity in the phrase 'distribute in pursuance of the plan of reorganization among creditors and stockholders', because what is implied is a division of the whole fund between two classes, in accordance with their respective rights. Indeed it would be difficult to select a more appropriate word than 'distribute' in this connection. (Cf. Baar &

Morris, Hidden Taxes in Corporate Reorganizations, supra, p. 266).”
to which said ruling of the Court the defendant duly excepted.

EXCEPTION NO. XIII

“ * * * The kind of estoppel here set up, known as equitable estoppel, or estoppel in pais, is a principle of equity, justice and good conscience; and it would be manifestly inequitable to apply that principle here. At the time the argument was advanced by the taxpayer, it related to a particular situation or phase of income tax accounting and neither party then had in view the different principle subsequently applied by the Commissioner in imposing the very much larger deficiency tax. Estoppel in pais is a valuable shield for defense, but it may not properly be converted into a powerful sword for attack. The situations in Swartz vs. Commissioner, 69 F.(2) 633, and Stevens Mfg. Co. vs. United States, 8 F. Supp. 720, were quite different from that here.”

EXCEPTION NO. XIV

“The final result is that the plaintiff is entitled to recover the amount sued for by it, \$69,554.69, with interest thereon from date of payment, less \$6,260.33 with interest thereon from the date the same was payable.”

to which said ruling of the Court the defendant duly excepted.

EXCEPTION NO. XV

The Court further announced its ruling as follows: “Verdict for the Plaintiff in the sum of Sixty-two Thousand, One Hundred Forty-five Dollars and Eighty-nine Cents (\$62,145.89), together with interest thereon from April 15, 1933, according to law.” to which said ruling of the Court the defendant duly excepted.

And now in furtherance of justice and that right may be done, the defendant tenders and presents the foregoing as the bill of exceptions in this appeal from the action of

the Court and prays that the same may be settled, allowed, signed and sealed by the Court and made a part of the record in this case.

BERNARD J. FLYNN,

United States Attorney
for the District of Maryland.

Approved as to form:

RANDOLPH BARTON, JR.,

JOSEPH ADDISON,

WILLIAM R. SEMANS.

The foregoing bill of exceptions duly allowed, settled, signed and sealed this 30th day of April, 1937.

W. CALVIN CHESNUT,
United States District Judge.

OPINION.

Including Findings of Facts and Conclusions.

Filed 30th December, 1936.

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.**

L. Manuel Hendler, as Transferee of
Creameries, Inc. (formerly Hendler
Creamery Company, Incorporated),

Plaintiff,

vs.

United States of America,

Defendant.

Law No. 5419

Chesnut, D. J.,

In this income tax case the controlling factor is the proper application of the corporation "reorganization" sections of the Revenue Act of 1928 to the facts of the

case, to be found in a stipulation supported by elaborate documentary evidence and some little verbal testimony.

On June 21, 1929, Hendler Creamery Company, Inc., a Maryland corporation, engaged in the manufacture and distribution of ice-cream in Baltimore City and vicinity, transferred all of its assets to the Borden Company, a corporation of the State of New Jersey. In consideration therefor the Borden Company assumed all the then outstanding liabilities of Hendler (with minor exceptions not material save in one particular hereinafter mentioned) and gave to Hendler 106,306 shares of the Borden Company common stock and \$43,421.87 in cash, all of which was immediately distributed to the stockholders of the Hendler Company. The transaction was consummated in accordance with a prior written agreement between the parties dated May 21, 1929, called a "reorganization agreement." The Hendler Company thereafter entirely discontinued business operations and, after filing its income tax return in 1929, was dissolved, having in the meantime changed its name to Creameries, Inc. Distribution of stock and cash to the stockholders of the Hendler Company was in pursuance of the plan of reorganization.

The outstanding liabilities of Hendler as of June 21, 1929, which were assumed by Borden, consisted of \$501,000 par value of first mortgage bonds which had been called for redemption on July 1, 1929; current bank loans in the amount of \$1,050,000; and merchandise accounts payable in the amount of \$130,410.78. The bonded indebtedness was completely paid and satisfied by the Borden Company on June 27, 1929, by surrendering to the Commonwealth Bank of Baltimore as Trustee, \$156,000 par value of the bonds and paying to the Trustee \$381,225 in cash, to retire the remaining \$345,000 face value of bonds which were redeemable at a premium of $7\frac{1}{2}\%$. The Trustee then formally released the mortgage. The total cost to the Borden Company, including the cash paid to the Trustee and the amount paid in the acquisition of the bonds acquired and surrendered by the Borden Company was \$534,297.40. The bank loans were paid off shortly after July 1, 1929, and the merchandise accounts were paid in due course within about thirty days thereafter. The former business of the Hendler Company was con-

tinned by the Borden Company through a newly organized corporation also named the Hendler Company.

By the plan of reorganization the Borden Company assumed the ordinary current income tax payable by the old Hendler Company for 1929, but expressly excluded any liability for excess income taxes, if any, arising from the reorganization transaction. In the income tax return prepared for the old Hendler Company (subsequently named Creameries, Inc.), no tax was shown to be due in consequence of the reorganization, but credit was taken as against ordinary gross income for two items of the alleged deductible expense, which included certain unamortized bond discount and premiums paid for redemption of bonds, both relating to the bond issue above mentioned. The effect of these deductions if allowable was to decrease the corporation's income tax for 1929 in the amount of \$6,260.33. In due course the return was locally examined by Revenue Agent Bauer, a Field Agent connected with the Baltimore office for about sixteen years and experienced as a certified public accountant. In his report of the audit he made the point that the bond discount and premium was not a proper deduction and therefore the tax payable should be increased by \$6,260.33. Other adjustments, not here in controversy, further increased the tax by \$5,591.75; so that the agent recommended a deficiency assessment of \$11,852.08. This was contested by representatives of Creameries, Inc., the letter of protest being signed by L. Manuel Hendler as president. As a result of an ensuing conference in Baltimore with representatives of Creameries, Inc., including the tax expert or accountant of the Borden Company, the local agents representing the Collector, including Mr. Bauer, were persuaded that the deductions of the bond discount and premium should be allowed. A report to this effect was then made to the Commissioner and resulted in a deficiency assessment of only \$5,591.76, which was duly paid by the Borden Company for Creameries, Inc. But later, in 1932, re-consideration was given in Washington by the Commissioner of Internal Revenue to the case, as a result of which it was determined that there was due a further deficiency in the amount of \$58,772.72. The basis of this determination as stated in the Commissioner's letter of June 4, 1932, to the taxpayer, was that, under the reorganization agreement the payment by the Borden

Company of \$534,294.40, in satisfaction of the bonded indebtedness of the old Hendler Company, amounted to a "constructive receipt" of that sum by Hendler which, *not being distributed to its stockholders*, became taxable under the reorganization sections of the 1928 Revenue Act, as a part of the whole calculated profit to the old Hendler Company by virtue of the transaction with the Borden Company. The amount of the total profit, based on the then market price of the Borden stock as determined by the Commissioner, was \$6,608,713.65. Whether the action of the Commissioner in taxing this item of \$534,297.40 was correct is the principal question in this case.

The additional deficiency as assessed by the Commissioner could not be paid by Creameries, Inc., because its assets had been conveyed to Borden and all its net receipts from Borden had been distributed to its stockholders. A deficiency assessment against the stockholders of the old Hendler Company was thus rendered necessary, as transferee of the corporate assets, and by subsequent agreement L. Manuel Hendler individually was substituted as the representative of the stockholders. He, having paid the additional assessment of \$58,772.72, plus interest of \$10,781.97 on April 15, 1933, to the then Collector, and his petition for refund thereof having been denied, has brought this suit for the recovery of the sum paid, \$69,554.69, with interest from date of payment. The suit is brought against the United States directly and not against the former Collector of Internal Revenue in Baltimore, who was no longer in office at the time of the institution of the suit. 26 U. S. C. A. s. 41(20).

The theory of the Government in justifying the tax in question is that the general rule with respect to income taxation both on individuals and corporations, requires an inclusion in income of "the entire amount of the gain or loss" resulting from the sale or exchange of property, except as otherwise provided by statute (Rev. Act of 1928, s. 112 (a); 45 Stat. 791); and the Government contends in this case that the statutory exceptions do not exclude the taxability of the item in controversy. We are thus brought directly to the consideration of the statutory exceptions which are relied upon by the plain-

tiff in this case. Section 112 (b) (4) of the 1928 Act provides:

"No gain or loss shall be recognized if a corporation, a party to a reorganization, exchanges property in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."

And Section 112 (d) provides:

"If an exchange would be within the provisions of sub-section (b) (4) of this section, if it were not for the fact that the property received in exchange consists not only of stock or securities, permitted by such paragraph to be received without the recognition of gain, but also of *other property or money* then—

(1) If the corporation receiving such other property or money *distributes it in pursuance of the plan of reorganization*, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money *does not distribute it in pursuance of the plan of reorganization*, the gain, if any, to such corporation shall be recognized, but in an amount not in excess of the sum of such money, and the fair market value of such other property so received, which is not so distributed."

"Reorganization" is defined by section 112 (i) as follows:

"(1) The term 'reorganization' means (a) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or *substantially all the properties of another corporation*, or (b) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (c) a recapitalization, or (d) a mere change in identity, form or place of reorganization, however affected."

(The crucial phrases have been italicized.) Similar provisions are contained in the Revenue Acts of 1924, 1926, 1932 and 1934.

The questions which are presented by the application of these statutory tax provisions to the facts of the case are (1) whether the inter-corporate transaction between Hendler and Borden was a "reorganization" within the statutory definition; (2) whether the item of \$534,297.40 was properly taxed by the Commissioner as "other property or money" *received* by Hendler and not *distributed* "in pursuance of the plan of reorganization"; and (3) if said item was not properly taxable, then is the amount otherwise recoverable by the plaintiff subject to the deduction of \$6,260.33, by which the income tax of Hendler for the year 1929 was decreased by the deduction of bond discount and premium above referred to.

First: As to "Reorganization". As a result of recent authoritative decisions, it is clear that the transaction was within the statutory definition of a "reorganization". The Commissioner so treated it in imposing the tax, and it was not disputed in the oral argument in this case by counsel for the Government, but the contrary is somewhat faintly urged in its brief subsequently filed. The point requires no extended discussion in view of the recent decisions. The definition in section 112 (i) (1) (A) includes in "reorganization" a case where one corporation acquires "substantially all the properties of another corporation". In this case Borden acquired all properties of Hendler, which received in exchange a definite and material amount of Borden stock, which represented a "substantial part of the value of the thing transferred." Thereafter Hendler transacted no business and shortly was dissolved, after distribution of the Borden stock to the stockholders of Hendler who thus acquired a substantial continuing interest in the Borden Company. The transaction was genuinely in the nature of a merger. Whatever uncertainty may have heretofore existed as to whether such a transaction was a reorganization has been completely dispelled by the recent decisions of the Supreme Court in *Helvering v. Minnesota Tea Co.*, 296 U. S. 378; *Helvering v. Watts*, 296 U. S.

387; G. & K. Mfg. Co. v. Helvering, 296 U. S. 389, and Nelson Co. v. Helvering, 296 U. S. 374. See also C. H. Mead Coal Co. v. Commissioner, 72 F. (2d) 22 (C. C. A. 4); Starr v. Commissioner, 82 F. (2d) 964 (C. C. A. 4); Western Industries Co. v. Helvering, 82 F. (2d) 461 (C. A. D. C.); Coleman v. Commissioner, 81 F. (2d) 455 (C. C. A. 10).

Second: *As to the taxability of the item of \$534,297.40.* In support of the taxability of this item the Government submits the broad contention that wherever, in a reorganization, the transferee corporation *assumes liabilities* of the transferor, such assumption of liabilities constitutes the receipt by the transferring corporation of "*other property or money*" which when not distributed to stockholders of the transferring corporation, is therefore taxable despite the provisions of 112 (d). This contention is, I think, untenable. No judicial decision is cited in support of it although there have been very many such reorganizations since the statute in similar form was first enacted; and there have been numerous decisions holding reorganizations (involving this feature) nontaxable, without discussion of the point. See Coleman v. Commissioner, 81 F. (2d) 455, 456; G. & K. Mfg. Co. v. Commissioner, 76 F. (2d) 454 (C. C. A. 4); (reversed 296 U. S. 389, and remanded to Board of Tax Appeals); Starr v. Commissioner, 82 F. (2d) 964 (C. C. A. 4); cert. denied, 298 U. S. 680; Watts v. Commissioner, 75 F. (2d) 981 (C. C. A. 2), affd. 296 U. S. 387; Tulsa Oxygen Co. v. Commissioner, 18 B. T. A. 1283; Frank Keel, 31 B. T. A. 212; National Pipe & Foundry Co. v. Commissioner, 19 B. T. A. 242; Fashion Center Building Co. v. Commissioner, 31 B. T. A. 167; Baar & Morris, Hidden Taxes in Corporate Reorganizations, p. 261. Cf. Dickey v. Commissioner, 32 B. T. A. 1283, and Brons Hotels, Inc., v. Commissioner, 34 B. T. A. 376 (six Commissioners dissenting). Furthermore the contention now advanced is contrary to the administrative practice for more than ten years, under the statutes so worded and several times re-enacted. (United States v. Hermanos, 209 U. S. 337; Helvering v. Bliss, 293 U. S. 144, 151); and evidently the Commissioner did not act on this view of the statute in making the assessment in this case because he under-

took to tax *only one item* of the liabilities assumed by Borden, and left untaxed the much larger amount of \$1,180,410.78, representing the bank loans and accounts payable which were also assumed and promptly paid by the Borden Company. Clearly an assumption of liabilities is not "money", and it is not sufficient to say it may be as valuable as money, as the word in the statute is not ambiguous, and therefore does not permit such latitude of construction. While the word "property" when used without qualifying context, has a very broad meaning and may include intangible rights, such as obligations (*Fidelity and Deposit Co. v. Arenz*, 290 U. S. 66, 68, 69), there seems to be no reasonable basis for the construction of the term, as used in the statute, to cover an assumption of liabilities by the transferee corporation: Here, as elsewhere, its meaning must be judged by the context. Of course the assumption if not discharged gives rise to a *chose in action*, which lawyers know is a property right, but neither lawyers nor layman, in common thought, would be apt to think of an assumption of liability as "property". A liability itself is certainly not property, and a tax on *all property* would not cover the assumption by another of one's liability. On the other hand, a tax on net worth might very well take into consideration the amount of a liability of the taxpayer which has been assumed by a solvent other person. An assumption by a purchaser of a mortgage debt on property bought is of course a valuable consideration to the vendor, and may properly be considered in ascertaining the whole value realized by the vendor-mortgagor, for purposes of comparison with the original cost to him, to determine the amount of loss or gain as taxable income. (See *Brons Hotels, Inc., v. Commissioner*, 34 B. T. A. 376.) But it is not the function of 112 (d) to measure the amount of a profit or gain. It assumes there has been gain, and determines whether and to what extent it shall be recognized. 112 (b) (4) provides that there shall be no tax payable if the exchange of property is solely for stock or securities of another corporation; and 112 (d) further provides there shall be no tax even if, in addition to stock and securities, the transferring corporation also *receives* "other property or money" if the latter is *distributed* in pursuance of the plan of reorgani-

zation; but if not so distributed, then the gain in the transaction must be included in income for taxation, "in amount not in excess of the sum of such money, and the fair market value of such other property so received, which is not so distributed". Here the word "property" is not only classed with stock, securities and money, but, like them, it is also clearly implied that it is to be susceptible of receipt by the corporation, distribution pursuant to the plan of reorganization and of ascertainable market value. It seems quite unreasonable to suppose that "property" in this context includes an assumption of liability, which in ordinary thought and speech does not have these characteristics.

Apart from the literal meaning of the section, the assumption of liabilities in this case was not within the substantial import of the statute. In financial substance Hendler merely exchanged its equity in its property for shares of stock in the Borden Company which represented only the equity therein, and which *pro tanto* were diminished in value by the Hendler liabilities assumed by Borden. Neither in form nor substance did Hendler receive any "other property or money" by Borden's assumption of Hendler's liabilities.

Counsel for the Government also contends the item of \$534,297.40, even if not taxable merely because an assumed liability, is nevertheless taxable in this particular case, by virtue of the special provisions of the reorganization agreement with respect to the bonded debt of the Hendler Company. This requires a more detailed reference thereto than has heretofore been made. There was an informal written agreement between Borden and Hendler in offer and acceptance form by letter dated April 16, 1929, which contemplated exchange of all the property of Hendler and its three wholly owned subsidiaries for certain cash and stock of Borden, subject to all liabilities with minor exceptions. No definite closing date was therein provided, but evidently it was contemplated it might be later than July 1, 1929, because it was stipulated that Hendler should call its bonds for redemption on July 1, 1929, and borrow the money to pay them, to be included in its debt taken over by Borden. A more formal contract was executed on May 21, 1929, whereby

in paragraph II(C) Borden did "assume and agree to pay all indebtedness and liabilities whatsoever of your Company and of the said subsidiary companies as the same shall exist at closing of title to us hereunder", with certain exceptions. "Closing of title" was defined as the date that Borden received title to the property, except as to income tax accounting which (by paragraph V) was fixed as of April 1, 1929. June 21, 1929, was fixed as the closing date, subject to adjournment to a later date if reasonably necessary. Again it was stipulated that Hendler should call its bonds for redemption on July 1, 1929, and could borrow the money to pay therefor and include the same in its debts assumed by Borden. (Paragraph III(F)). Hendler did call its bonds as stipulated; did not borrow any money to pay them; the properties were actually deeded over to Borden on June 21, 1929, and the cash and stock then delivered to Hendler. Bonds were then outstanding to the par value of \$501,000, including \$7,000 held in the treasury of Hendler. In May and June, Borden bought in the market and elsewhere \$149,000 of the bonds at a cost of \$153,072.40, and about July 1, surrendered them with the \$7,000 treasury bonds, to the trustee for cancellation, and also paid the trustee on June 27, \$381,225 for redemption of the remaining \$345,000 bonds, at par, interest and premium. The trustee then satisfied the mortgage by appropriate instrument.

On these facts the Government contends the cost to Borden of satisfying the bonded indebtedness, \$534,297.40, was "money constructively received" by Hendler and not distributed to stockholders, and therefore taxable, being less than the real "gain" to Hendler, at then prevailing market prices. Special reference is made to the contract provision (IIIB), "at or prior to the closing of title to us the said mortgage will be satisfied as provided by Section 3 of Article IV thereof, and we shall be furnished with a satisfaction piece at the closing". But it must be remembered that the contract also provided that Hendler could borrow the money to redeem the bonds and include the amount in the liabilities to be assumed. In closing the transaction before July 1, 1929, before the bonds were redeemable, and while they were still outstanding, Borden waived the requirement for satisfaction of the mortgage at the closing date and took

the property subject to the bond issue, which then became one of the liabilities of Hendler assumed at the closing by Borden, just as it assumed the bank loans and current accounts payable; and Borden itself paid all of them within a month thereafter. None of the money that paid these debts was ever received or distributed by Hendler. It is apparent from the whole of the contract that Borden took the property subject to the liability of the cost of redeeming the bonds, and the corporate resolutions of both Hendler and Borden also show this was the clear intention of the parties. If the closing date had actually been after July 1st, the bonds would have been retired but the liabilities assumed by Borden increased by the cost thereof. In closing before July 1st, Borden took the property subject to the bonds, without the added cost of retirement in Hendler liabilities, but with the obligation on Borden to directly defray the cost. In the deed of June 21, 1929, from Hendler to Borden, the latter expressly assumed and agreed to pay "all the indebtedness and liabilities whatsoever" of Hendler then existing, which of course included the outstanding bonds, which had been called for redemption July 1st following.

What the Government specifically urges is that Borden's payment of the bonds was a payment made for Hendler and therefore a constructive receipt and disbursement of the money for its own account and in payment of its own debt. But this was not the case. As between Borden and Hendler the debt was then Borden's and not Hendler's, by virtue of the contract and what was done by the parties. In closing before July 1, 1929, with the bonds outstanding Borden assumed them by the express provisions of the contract and the deed. Likewise it waived the stipulation for its benefit as to the satisfaction of the bonds before closing, but thereby did not increase at all the cost to itself of the whole transaction. If Borden had not waived the "satisfaction piece", then the money to satisfy the bonds would have been borrowed by Hendler, and would have furnished no basis for the particular contention now advanced. The cost of the bond redemption was not taxable by the contract as worded or as executed. If there were any difference, the latter would prevail as to taxability. *United States vs. Phillips*, 257 U. S. 156, 172; *American Security & Trust Co. vs.*

Tait, 5 F. Supp. 337, 341, (D. C. Md.). But the item cannot properly be made taxable by a strained construction of the transaction resulting from a combination of both what the contract provided and what the parties actually did, when it is not taxable on either basis separately considered. The really important question here is whether the payment when made by Borden was for its own account, in its relation to Hendler, or for the latter's account. Clearly it was the former.

The time of payment, only a few days after the closing, is stressed as indicating that it was Hendler's debt that was being paid by Borden. But that is quite immaterial in the case of the bonds as in the case of the other liabilities. The defendant's counsel cites *Old Colony Trust Co. vs. Commissioner*, 279 U. S. 716; *United States vs. Boston & Maine Railroad Co.*, 279 U. S. 732; and *United States vs. Kirby Lumber Co.*, 284 U. S. 1, to show that there may be a constructive receipt of ordinary income for tax purposes, but we are not dealing here with what constitutes ordinary income, but with the construction of "other property or money" in this particular section of the law. Counsel for the Government also rely upon the case of *The Liquidating Company vs. Commissioner of Internal Revenue*, 33 B. T. A. 1173, in support of their contention. In many respects the reorganization there was like that here, but on the precise point here involved there was a material difference which makes the case distinguishable. The Liquidating Company was a Delaware corporation formerly called Standard Creameries, Inc., engaged in business in California. Its properties were acquired in 1929 by the Borden Company pursuant to a plan of reorganization in general outline very similar to the contract in this case; but it differed in an important formal respect with regard to the provision for the payment of the outstanding bond issue of the Liquidating Company. Its bonds were convertible into common stock, and at the time of making the agreement the conversion privilege had not expired. The amount of the bonds that would be outstanding at the time of settlement was, therefore, not known, and in the reorganization agreement Borden did not assume the payment of the outstanding bonds together with the other liabilities, but in a separate clause of the contract it agreed to "provide the funds necessary

for the redemption on September 1, 1929, of your said \$1,298,000 of ten-year 6½% Convertible Debenture Bonds, or so many thereof as shall not before that time be converted into common stock of your Company." Pursuant to the agreement Borden deposited with the trustee in the trust indenture securing the bonds funds sufficient to redeem them. The Board, after pointing out that Borden had not assumed the payment of the bonds with other liabilities, held that the money paid by Borden to the trustee was cash received by The Liquidating Company and taxable because not distributed to stockholders. That case, therefore, differs from the present in the important respect (at least so far as form is concerned) that Borden did not assume the payment of the bonds as its own obligation but agreed to furnish the funds to redeem the bonds.

The importance of the form of the transaction as affecting tax liability in such cases, in the opinion of the Board of Tax Appeals, appears from the case of the Minnesota Tea Company v. Commissioner, 34 B. T. A. 145, decided by the Board shortly after the case of The Liquidating Company, with which it may be contrasted. The Minnesota Tea Company, pursuant to a plan of reorganization, transferred its assets to another corporation in exchange for voting trust common stock and \$426,842.52 in money. It retained the stock but immediately distributed the money among its stockholders who, however, agreed to and did pay liabilities of the Tea Company in the amount of \$106,472.72. In this case it will be noted that the other corporation did not assume the liabilities of the Tea Company but acquired the property free of debts which had to be discharged by the Tea Company. Nevertheless the Board held that as all the money received by the Tea Company was first distributed to stockholders, who then paid the liabilities, there was no taxable feature in the transaction. It declined to hold that there was a *constructive* distribution of the money by the corporation to its creditors, which made the \$106,472.72 taxable under the ruling in the case of The Liquidating Corp. *supra*. Here again obviously the form was treated as controlling. And if the form is sufficient to control the decision there would seem to be even less

reason in the instant case for holding the transaction taxable than in the Tea Company case; and also sufficient to distinguish the case of The Liquidating Company, as decided by the Board.

There is another difficulty in the position of the defendant in this case. In addition to showing that the money for the redemption of the bonds was received by the corporation, it must also show that it was not distributed *in pursuance of the plan of reorganization*. On this point the position taken by the defendant is that the only distribution within the statute is a distribution to *stockholders*; and therefore a distribution to creditors, even though required by the plan of reorganization, subjects the money so paid to taxation. In support of its position the defendant relies on the case of The Liquidating Company, *supra*, where the Board of Tax Appeals did so hold. That decision seems to have been based principally on *West Texas Ref. & Dev. Co. vs. Commissioner*, 68 F. (2d) 77, 80 (C. C. A. 10), where it was briefly stated that, in a reorganization, money received by a corporation which is used to pay debts and not distributed to stockholders is taxable as otherwise a realized gain would escape taxation. The matter was not further discussed probably in view of the fact that on the main point of the case the transaction was held not a reorganization but a sale. The decision was in 1933, prior to the above-mentioned decisions of the Supreme Court applying the reorganization statute. The same question was noted but not decided, on the first appeal from the Board in the *Minnesota Tea Company* case, 76 F. (2d) 797, 799, 803 (C. C. A. 8), affirmed 296 U. S. 378. The case was remanded to the Board for determination of the point on the merits, and the Board then decided that the money used to pay debts was not taxable because it had first been distributed to the stockholders by whom the debts were paid. The decision was thus made to depend upon the mere form of the particular transaction. The practical importance of taxation in corporate reorganizations warrants more extended consideration of the question of whether money received and distributed or disbursed by a corporation in

payment of debts as required by the plan of reorganization, is taxable under the statute. (Note.)

Note: In the earlier case of *National Pipe and Foundry Co. v. Commissioner*, 19 B. T. A. 242, a corporate reorganization was held not taxable although a large sum had been received by the corporation and applied in payment of debts as required by the plan; but there was no discussion of the particular point. In *Montgomery's Federal Income Tax Hand Book* (1935-36), page 202, in discussing the meaning of distribution as used in the statute, the author says:

"In *Pinella's Ice & Cold Storage Co. v. Commissioner* (287 U. S. 462), all the cash was used to pay creditors. The corporation was held to be taxable on other grounds but no question was made regarding the payment to creditors being a distribution. In the author's opinion a distribution to bondholders or general creditors should be considered a distribution under Section 112(d) if it is part of the reorganization plan. Very frequently, a reorganization can be effected in no other way."

See also Baar & Morris "Hidden Taxes in Corporate Reorganizations", p. 264, s. 15, where, after discussion of this particular subject and a review of the *National Pipe & Foundry Company* case, the authors say:

"Such a case is no different in any substantial respect from that in which the corporation 'acts merely as a conduit in passing the proceeds of sale on to its stockholders', the result being the same as the acquisition of all the stock, followed by liquidation. It would therefore appear to be consistent with the legislative purpose, as explained in the 'Statement of the Changes made in the Revenue Act of 1921 by the Treasury Draft and the Reasons Therefor', quoted above (at Sec. 4) and in the substantially identical reports of the House and Senate Committees, that no gain of the transferor corporation should be recognized in such a case."

Two thoughts are clearly expressed in Section 112 (d). One is that money or property received by the corporation and distributed in pursuance of the plan is not taxable to the corporation; the other is that money or other property so received and not so distributed, is taxable. Here the antithesis seems to be on distribution or retention by the corporation, and not distribution to stockholders or creditors. A third situation (the one with which we are here dealing) must be determined by a construction of the word "distribute" as used in the statute. Does it necessarily cover only a distribution to stockholders? The statute does not so say and the construction contended for by the defendant reads into the statute words ("to the stockholders") which do not expressly appear therein; and in so doing reads out of the statute (or at least gives little significance to) the phrase "in pursuance of the plan of reorganization." The construction must be within and not without the words of the

statute, and should if possible be consistent with the purpose of the enactment. Its legislative history is extensively reviewed in *Mead Coal Co. vs. Commissioner*, 72 F. (2d) 22, 27 (C. C. A. 4); *Minnesota Tea Co. vs. Commissioner*, 34 B. T. A. 145, and *Baar & Morris, Hidden Taxes in Corporate Reorganizations*, p. 244. It is, I think, apparent with reasonable clarity therefrom that the fundamental purpose of Congress was to remove from ordinary business transactions, in the nature of corporate mergers or reorganizations, the burden of heavy taxation on mere paper profits, and also to shift the ultimate incidence of taxation from the corporation to its stockholders where the corporate gain is distributed to them to be paid by them when actually realized.

In corporate mergers and reorganizations the assumption of liabilities and the payment of debts is a very usual feature. The principal purpose of the financial negotiations preceding the contract is to reach an agreement as to the price to be paid for the *net* value of the assets to be transferred. When price and terms have been agreed upon it is largely a matter of legal detail as to the method of paying the debts. The contract of reorganization may provide for this in any one of several ways; (1) the transferee may pay the transferor only the *net* worth of the assets, and assume the liabilities; or (2) the transferor, before the actual transfer, may apply the quick assets to extinguish the current liabilities, or (as in this case) convert funded into current liabilities by optional call for redemption and borrow the money to pay them; or (3) the transferee may pay to the transferor the gross value of the assets, but require the liabilities to be paid by the latter from the fund. The financial result to the transferor is exactly the same in all three cases. In (2) it is clear that the money used to pay the debts would not be taxable on any theory. In (1) it is also not taxable unless it is to be held that an assumption of liabilities itself makes the transaction taxable; but for the reasons already given, I have concluded that it does not. And there would seem to be no substantial reason for holding the transaction taxable in (3), the other case. To so hold would allow the mere form of the transaction to overcome the substance when clearly income taxability should be determined, within the statutory wording, by substance rather than form. *United States vs. Phellis*, 257 U. S. 156; *Starr*

vs. Commissioner, 82 F.(2d) 964, 968 (C. C. A. 4). If form alone is to be made the basis of decision as to taxability, the practical futility of reading into the statute the phrase, "to the stockholders" would appear from the Minnesota Tea Company case where the Board of Tax Appeals held that taxability was avoided by distributing the money to the stockholders with their agreement to pay the debts.

There is no lexicological difficulty involved in including creditors within the scope of "distribute" as used in the section under consideration. It might possibly be considered inapt to use the word if the distribution were limited to creditors only, because "distribute to creditors" is such a familiar phrase in bankruptcy and insolvency, where it most often implies something less than payment in full. But there is no linguistic infelicity in the phrase "distribute in pursuance of the plan of reorganization among creditors and stockholders," because what is implied is a division of the whole fund between two classes, in accordance with their respective rights. Indeed it would be difficult to select a more appropriate word than "distribute" in this connection. (Cf. Baar & Morris, *Hidden Taxes in Corporate Reorganizations*, supra, p. 266).

Counsel for the defendant points out that in other related sections of the statute (112(g) and 115) Congress has expressly limited "distribution" as there used to stockholders; but this sign post for construction at best points two ways, because in those sections the words "to stockholders" were imperatively required by the subject matter, which related to the taxation of the individual stockholders, while the section now being considered (112(d)) relates to the corporation itself, as distinct from its stockholders, and in this connection the word distribute was not followed by the words "to stockholders." By contrast its omission in this section may be regarded as significant. Of course, to be non-taxable, the money must have been distributed in accordance with the plan of reorganization. We are not considering a situation where money is received and retained by a corporation for its general corporate purposes.

The point has been discussed so far largely from the standpoint of the literal import of the wording of the statute, as its application to the facts of the case must of

course be not inconsistent with its language; but if the latter is considered sufficiently open to permit or require construction, then the basis of the decision should be the intent of the Act to be gathered from its provisions as a whole and as disclosed in its legislative history. As already indicated the central thought was to remove from ordinary business transactions the deterrent influence of immediate and possibly onerous taxation on merely paper profits. Obviously taxation to the corporation of money received by it and disbursed in payment of debts, as required by the plan of reorganization, would tend to frustrate this intent of the statute. It seems not a sufficient answer to say that in such case the tax must be imposed, otherwise a gain will escape taxation. The net gain to the corporation is not marked by money paid by it to creditors but by what it retains, or distributes to stockholders, and in the latter case they become ultimately liable to proper taxation on actually realized gain. As to this the evident thought of the statute was to postpone, rather than to exempt from, taxation. It is conceivable, of course, that the amount of the taxes, as finally realized by the Government, by such postponement, from the reorganization as the proximate cause, may be less, by the operation of the complex provisions of our income tax system, corporate and individual, than it would have been if the tax on the gain had been levied on the corporation, but this circumstance was entirely within the field of congressional power, and should not be allowed to impair the free operation of the statute to accomplish its major objective. *Helvering vs. Bliss*, 293 U. S. 144, 151. In this connection it is not inappropriate to note that by section 112(e) the corporation is not allowed to take credit in tax accounting for a loss in such case resulting from a reorganization. See *Mead Coal Co. vs. Commissioner*, 72 F.(2d) 22, 28 (C. C. A. 4).

I conclude, therefore, that money received by the corporation and applied in pursuance of the plan of reorganization to the payment of debts is not to be treated as a taxable gain to the corporation. But finally on this point it is to be observed that this is really not the crucial point in this particular case, because neither in form nor in substance, did Hendler receive any money or property which was not distributed to stockholders. As to form, the money used to pay the bonded debt was never actual-

ly received or distributed, or retained by the corporation; and as to substance, all that Hendler received in the transaction (other than a comparatively small amount of cash distributed to preferred stockholders) was common stock of Borden, representing the equity in its property, in exchange for the equity in Hendler property. The item of \$534,297.40 was not taxable.

As to estoppel: The Government sets up an estoppel against the plaintiff. The circumstances on which this is based have already been stated. In the Hendler tax return for 1929 deduction was claimed for bond discount and premium which, if properly allowed, reduced the tax in the amount of \$6,260.33. The Field Agent first disallowed the deduction but later, in consequence of a protest from the taxpayer, followed by a conference with tax counsel, the deductions were approved, and the tax so determined was paid. Later the Commissioner made the much larger deficiency assessment on the basis, partially at least, of the position taken by the taxpayer at that time as to the effect of the reorganization agreement. But the circumstances do not constitute an estoppel. There was no misrepresentation of fact, as all of the facts were fully and equally known to both the parties. What was advanced by the taxpayer's representative was merely a matter of opinion as to the application of the income tax law under admitted facts. The argument then stressed by the taxpayer seems to have been in substance that for the purpose of the income tax accounting of the taxpayer, the effect of the reorganization should be disregarded with respect to the bond redemption because the bonds continued to be the obligation of the taxpayer until actually redeemed. This was undeniably true as between Hendler and its bondholders, but not as between Hendler and Borden. The question as to what was the effect of the legal situation respecting the bonds as influencing the income tax return was clearly only a matter of opinion on the question of law and cannot properly be made the basis of an estoppel. *United States vs. Scott*, 69 F.(2d) 728, 732 (C. C. A. 1); *Ward vs. Ward*, 131 F. 946, 953; affirmed 145 F. 1023; *Marshall vs. Security Co.*, 155 Md. 649, 653; 21 C. J. 1142, 1147. Furthermore, the Government has sustained as prejudice as a result of the taxpayer's contention because, if it was unsound, the tax saving by virtue of the allowance of bond discount and

premiums as deductions can now be recouped by the defendant, even though the time has expired for a deficiency assessment for the particular item. *Lewis vs. Reynolds*, 284 U. S. 281. The kind of estoppel here set up, known as equitable estoppel, or estoppel *in pais*, is a principle of equity, justice and good conscience; and it would be manifestly inequitable to apply that principle here. At the time the argument was advanced by the taxpayer, it related to a particular situation or phase of income tax accounting and neither party then had in view the different principle subsequently applied by the Commissioner in imposing the very much larger deficiency tax. Estoppel *in pais* is a valuable shield for defense, but it may not properly be converted into a powerful sword for attack. The situation in *Swartz vs. Commissioner*, 69 F.(2d) 633, and *Stevens Mfg. Co. vs. United States*, 8 F. Supp. 720, were quite different from that here.

Third: The taxpayer's contention just referred to was, in my opinion, unsound and the position first taken by the Field Agent in disallowing the deductions for bond discount and premiums was correct. Although the reorganization did not itself directly then impose a tax on Hendler, it had the necessary incidental effect of relieving Hendler entirely from liability on the bond issue which was paid by Borden. Clearly Hendler could not reduce its proper tax for the current year by the amount of a bond premium which it had never paid. And as bond discount is merely an increased interest rate on bonds it follows that proper credit therefor necessarily disappeared when the obligation on the principal of the bonds itself was removed from Hendler's liabilities. *Western Maryland Rwy. vs. Commissioner*, 33 F.(2d) 695 (C. C. A. 4). The defendant is therefore entitled to a deduction in the amount of \$6,260.33 from the principal amount claimed by the plaintiff.

The final result is that the plaintiff is entitled to recover the amount sued for by it, \$69,554.69, with interest thereon from date of payment, less \$6,260.33 with interest thereon from the date the same was payable. Counsel should agree upon this date and submit for approval the special form of verdict in this case, as required by 28 U. S. C. s. 284, as amended June 22, 1936 (49 Stat. 1746), on which judgment in the same form will be entered by the clerk in due course.

The parties have submitted a number of separate written requests for instructions which I have marked "granted" or "refused" respectively consistent with the conclusions herein, with exceptions noted for each of the parties as to each adverse ruling. It has not been necessary to rule on all the prayers submitted by the plaintiff. Many of them would have to be refused because while correctly stating a major proposition, they contain minor defects, or improper final conclusions.

This opinion is adopted as the findings of fact and conclusions required by the applicable statute, 28 U. S. C. A. s. 764; *Atkinson vs. United States*, 73 F.(2d) 214; *United States vs. Tinsley*, 63 F. 433 (C. C. A. 4). As the controversy in the case is over questions of law, and there is no dispute as to the facts, it is not deemed necessary to make more formal or specific findings of fact than are recited in the opinion, but if either of the parties desires them, they may be submitted for consideration.

W. CALVIN CHESNUT,
U. S. District Judge.

Dated:

December 30, 1936.

ASSIGNMENT OF ERRORS

Filed 10th April, 1937.

(Style of Court and Title Omitted)

Now comes the defendant, by Bernard J. Flynn, United States Attorney in and for the District of Maryland, and makes and files the following assignment of errors upon which the defendant will rely for the prosecution of its appeal from the judgment of this Court made and entered in the office of the Clerk of the District Court of the United States for the District of Maryland on the 11th day of January, 1937:

1. The District Court erred in refusing to direct a verdict for the defendant.

2. The District Court erred in refusing to dismiss plaintiff's action upon the merits.

3. The District Court erred in directing a verdict for the plaintiff for \$62,145.89, with interest.

4. The District Court erred in failing and refusing to enter judgment in favor of the defendant.

5. The District Court erred in rendering and entering judgment for the plaintiff in the sum of \$62,145.89, with interest thereon from April 15, 1933, or for any sum whatsoever.

6. The District Court erred in refusing "DEFENDANT'S PRAYER NO. 1," reading as follows:

"The defendant prays the Court to rule as a matter of law that the satisfaction and cancellation of \$494,000 face value bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) procured by the Borden Company at a cost of \$534,297.40 pursuant to an agreement between said corporations constituted part of the consideration for the acquisition of the assets of the former by the latter on, to wit, June 21, 1929, and is 'money or other property' received and not distributed by said Creameries, Inc., within the meaning of Section 112(d)(2) of the Revenue Act of 1928, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

7. The District Court erred in refusing "DEFENDANT'S PRAYER NO. II," reading as follows:

"The defendant prays the Court to rule as a matter of law that the promise or undertaking of the Borden Company to procure the satisfaction and cancellation of \$494,000 face value bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) which was effected in May and June, 1929, at a cost to said Borden Company of \$534,297.40 constituted part of the consideration for the acquisition of the assets of said Creameries, Inc., on, to wit, June 21, 1929, and is 'money or other property' received and not distributed by the latter corporation within the meaning of Section 112(d)(2) of the Revenue Act of 1928, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

8. The District Court erred in refusing "DEFENDANT'S PRAYER NO. III," reading as follows:

"The defendant prays the Court to rule as a matter of law that the surrender for cancellation by the Borden Company to the Commonwealth Bank on, to wit, June 27, 1929, of \$149,000 face value of bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.), said bonds having been acquired in May and June, 1929, at a cost of \$153,072.40, including interest, pursuant to its promise or undertaking constituted money or other property received and not distributed by said Creameries, Inc., the obligor on the bonds as part of the consideration for the transfer of its assets to said Borden Company on, to wit, June 21, 1929."

9. The District Court erred in refusing "DEFENDANT'S PRAYER NO. IV," reading as follows:

"The defendant prays the Court to rule as a matter of law that the payment of \$381,225 in cash by the Borden Company to the Commonwealth Bank to satisfy bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) of the face value of \$345,000, said bonds having been called for retirement at a price of 107½% plus interest, constituted money or other property received and not distributed by said Creameries, Inc., as part of the consideration for the

conveyance of its assets to said Borden Company on, to wit, June 21, 1929."

10. The District Court erred in refusing "DEFENDANT'S PRAYER NO. V," reading as follows:

"The defendant prays the Court to rule as a matter of law that the plaintiff has failed to sustain his burden of proving that Creameries, Inc. (formerly Hendler Creamery Co., Inc.) was not taxable with respect to gains of not less than \$534,297.40 realized upon sale or other disposition of its assets to the Borden Company in 1929 pursuant to certain agreements between said corporations dated April 16, 1929, and May 21, 1929, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

11. The District Court erred in refusing "DEFENDANT'S PRAYER NO. VIII," reading as follows:

"In the event the Court holds that the sum of \$534,297.40 was improperly taxed to Creameries, Inc., as money or other property received in accordance with the provisions of Section 112(d)(2) of the Revenue Act of 1928, the defendant prays the Court to rule as a matter of law that the entire gain of \$6,608,712.65 realized in 1929 by Creameries, Inc., upon sale or other disposition of its assets to the Borden Company was taxable income received by the former and not exempt from tax in that the consideration received by said Creameries, Inc., did not consist (a) solely of stock or securities within the meaning of Section 112(b)(4) of the Revenue Act of 1928, nor (b) of stock or securities and money or other property received and not distributed within the meaning of Section 112(d)(2) of the Revenue Act of 1928."

12. The District Court erred in refusing "DEFENDANT'S PRAYER NO. IX," reading as follows:

"The defendant prays the Court to rule as a matter of law that the plaintiff is estopped from now claiming a different effect to the contracts and agreements between Creameries, Inc. (formerly Hendler Creamery Co., Inc.) and the Borden Company from that which he urged and contended for in his sworn protest of June 8, 1931, and which the representatives of said

corporation urged at a conference with representatives of the Commissioner of Internal Revenue held in September, 1931, upon the basis of which protest and conference the Commissioner allowed deductions for unamortized discount and for premium upon bonds retired, reducing the proposed deficiency by \$6,260.33 and adopting the taxpayer's view so insistently urged that the bonded indebtedness of Creameries, Inc., was not assumed with other liabilities by Borden Company on, to wit, June 21, 1929, but was at the time of payment by the latter corporation the obligation of said Creameries, Inc., and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

13. The District Court erred in making and entering its findings and conclusions that the Borden Company assumed the bonded indebtedness of Creameries, Inc., the Court's holding being indicated by excerpts from the opinion as follows:

"The outstanding liabilities of Hendler as of June 21, 1929, which were assumed by Borden, consisted of \$501,000 par value of first mortgage bonds which had been called for redemption on July 1, 1929; current bank loans in the amount of \$1,050,000; and merchandise accounts payable in the amount of \$130,410.78. * * *"

"* * * In closing the transaction before July 1, 1929, before the bonds were redeemable, and while they were still outstanding, Borden waived the requirement for satisfaction of the mortgage at the closing date and took the property subject to the bond issue, which then became one of the liabilities of Hendler assumed at the closing by Borden, just as it assumed the bank loans and current accounts payable; and Borden itself paid all of them within a month thereafter. * * *"

14. The District Court erred in its conclusion of law that the transaction between Creameries, Inc., and the Borden Company was a statutory reorganization, the Court's holding being indicated by an excerpt from the opinion as follows:

"First: As to 'Reorganization'. As a result of recent authoritative decisions, it is clear that the transaction was within the statutory definition of a 'reorganization'. . . ."

15. The District Court erred in its conclusion of law that Creameries, Inc., did not receive money or property in the sum of \$534,297.40 by reason of the assumption of indebtedness of said corporation in that amount by the Borden Company, the Court's holding being indicated by an excerpt from the opinion as follows:

"Second: As to the taxability of the item of \$534,297.40. In support of the taxability of this item the Government submits the broad contention that wherever, in a reorganization, the transferee corporation assume liabilities of the transferor, such assumption of liabilities constitute the receipt by the transferring corporation of 'other property or money' which when not distributed to stockholders of the transferring corporation, is therefore taxable despite the provisions of 112(d). This contention is, I think, untenable. . . ."

16. The District Court erred in its finding and conclusion that the Government's contention that the assumption of liability by the transferee resulted in the receipt of taxable income was contrary to the administrative practice for more than ten years, the Court's holding being indicated by an excerpt from the opinion as follows:

". . . Furthermore the contention now advanced is contrary to the administrative practice for more than ten years, under the statutes so worded and several times reenacted. . . ."

17. The District Court erred in its conclusion of law that the assumption of liabilities is not property within the meaning of Section 112(d) of the Revenue Act of 1928, the Court's holding being indicated by an excerpt from the opinion as follows:

". . . It seems quite unreasonable to suppose that 'property' in this context includes an assumption of liability, which in ordinary thought and speech does not have these characteristics.

"Apart from the literal meaning of the section, the assumption of liabilities in this case was not within

the substantial import of the statute. In financial substance Hendler merely exchanged its equity in its property for shares of stock in the Borden Company which represented only the equity therein, and which pro tanto were diminished in value by the Hendler liabilities assumed by Borden. Neither in form nor substance did Hendler receive any 'other property or money' by Borden's assumption of Hendler's liabilities."

18. The District Court erred in its conclusion of law that the term "distributes" as used in Section 112(d) of the Revenue Act of 1928 includes sums paid to creditors and is not limited to distributions to stockholders in pursuance of the plan of reorganization, the Court's holding being indicated by an excerpt from the opinion as follows:

"There is no lexicological difficulty involved in including creditors within the scope of 'distribute' as used in the section under consideration. It might possibly be considered inapt to use the word if the distribution were limited to creditors only, because 'distribute to creditors' is such a familiar phrase in bankruptcy and insolvency, where it most often implies something less than payment in full. But there is no linguistic infelicity in the phrase 'distribute in pursuance of the plan of reorganization among creditors and stockholders,' because what is implied is a division of the whole fund between two classes, in accordance with their respective rights. Indeed it would be difficult to select a more appropriate word than 'distribute' in this connection. (Cf. Baar & Morris, *Hidden Taxes in Corporate Reorganizations*, supra, p. 266)."

19. The District Court erred in its conclusion of law that plaintiff is not estopped from claiming a different effect to the contracts and agreements between Creameries, Inc., and the Borden Company from that which he urged and contended for in his sworn protest of June 8, 1931, the Court's holding being indicated by an excerpt from the opinion as follows:

" * * * The kind of estoppel here set up, known as equitable estoppel, or estoppel in pais, is a principle

of equity, justice and good conscience; and it would be manifestly inequitable to apply that principle here. At the time the argument was advanced by the taxpayer, it related to a particular situation or phase of income tax accounting and neither party then had in view the different principle subsequently applied by the Commissioner in imposing the very much larger deficiency tax. Estoppel in pais is a valuable shield for defense, but it may not properly be converted into a powerful sword for attack. The situations in *Swartz vs. Commissioner*, 69 F.(2d) 633, and *Stevens Mfg. Co. vs. United States*, 8 F. Supp. 720, were quite different from that here."

WHEREFORE, the defendant prays that the judgment of the District Court for the District of Maryland be reversed, and that the said District Court be directed to enter judgment dismissing the complaint herein, and for such other and further relief as to the Court may seem just.

BERNARD J. FLYNN,
United States Attorney.

STIPULATION AS TO RECORD ON APPEAL

Filed 29th April, 1937.

(Style of Court and Title Omitted)

It is stipulated and agreed by and between the parties to this cause that the transcript of record on appeal to the United States Circuit Court of Appeals for the Fourth Circuit in said cause shall consist of the following:

1. Plaintiff's declaration.
2. Defendant's pleas.
3. Docket entry of joinder of issue.
4. Opinion of the Court.
5. Verdict and Judgment.
6. Order of Court dated February 15, 1937, extending time for filing Bill of Exception.
7. Order of Court dated March 25, 1937, extending time for filing Bill of Exceptions.
8. Bill of Exceptions.
9. Defendant's prayer for allowance of appeal.
10. Order of Court allowing appeal.
11. Assignment of errors.
12. Docket entries.

13. Stipulation as to record on appeal.
14. Memorandum of the Clerk.
15. Order to transmit record.
16. Clerk's Certificate.

RANDOLPH BARTON, JR.,
JOSEPH ADDISON,
WILLIAM R. SEMANS,
Attorneys for Plaintiff.

BERNARD J. FLYNN,
United States Attorney
Attorney for Defendant.

MEMORANDUM OF THE CLERK.

1. Petition for appeal filed 10th April, 1937.
2. Appeal granted 10th April, 1937.
3. Appeal by United States of America.
4. Citation dated 10th April, 1937. (Service acknowledged).

ORDER TO TRANSMIT RECORD.

And, thereupon, it is Ordered by the Court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit and the same is transmitted accordingly.

Test:

ARTHUR L. SPAMER,

Clerk.

CLERK'S CERTIFICATE.

**UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, TO WIT:**

I, **ARTHUR L. SPAMER**, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing is the true transcript of the record and proceedings of the said District Court in the therein entitled case of **L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) vs. United States of America, No. 5419 Law Docket**, together with all things thereunto relating in the therein entitled cause as agreed to and made up per stipulation of counsel for the respective parties filed in said cause.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said District Court this 28th day of May, 1937.

ARTHUR L. SPAMER,

Clerk of said District Court.

(Seal)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

No. 4202

UNITED STATES OF AMERICA, APPELLANT

vs.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC. (FORMERLY
HENDLER CREAMERY CO., INC.), APPELLEE

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

May 31, 1937, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, and citation are certified up under section 7 of Rule 14.

Same day, petition and order extending the time for filing the transcript of record and docketing the case to the 31st day of May 1937, are filed.

Same day, the appearance of James W. Morris, Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, is entered for the appellant.

June 2, 1937, twenty-four copies of the printed record are filed.

June 5, 1937, the appearance of Randolph Barton, Jr., Joseph Addison, and William R. Semans is entered for the appellee.

Same day, stipulation to place case at the foot of the docket for argument at the June term, 1937, is filed.

June 14, 1937, the appearance of Arnold Raum, Special Assistant to the Attorney General, is entered for the appellant.

ARGUMENT OF CAUSE

July 7, 1937 (June term, 1937), cause came on to be heard before Parker, Northcott, and Soper, Circuit Judges, and is argued by counsel and submitted.

Judgment

Filed and Entered August 7, 1937

United States Circuit Court of Appeals, Fourth Circuit

No. 4202

UNITED STATES OF AMERICA, APPELLANT

*vs.*L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC. (FORMERLY
HENDLER CREAMERY CO., INC.), APPELLEE

Appeal from the District Court of the United States for the District of Maryland.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

August 7th, 1937.

MORRIS A. SOPER,
U. S. Circuit Judge.

On another day, to-wit, September 7, 1937, the mandate of this Court in this cause is issued and transmitted to the District Court of the United States for the District of Maryland, at Baltimore, in due form.

Same day, the original petition for appeal and order allowing appeal are returned to the Clerk of the District Court at Baltimore, Maryland.

*Clerk's certificate*UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 19th day of October A. D. 1937.

[SEAL]

CLAUDE M. DEAN, *Clerk,*
*U. S. Circuit Court of Appeals, Fourth Circuit.**Opinion*

August 6, 1937

SOPER, *Circuit Judge:* The United States has appealed from the decision of the District Court holding that under Section 112 of the

Revenue Act of 1928 the computation of the taxable gain of the Hendler Creamery Co., Inc., resulting from the performance of a reorganization agreement with the Borden Company, should not take account of the bonded debt of the Hendler Company which was assumed by the Borden Company.

On June 21, 1929, in conformity with a "reorganization agreement" of May 21, 1929, the Hendler Company transferred all of its assets to the Borden Company in exchange for 105,306 shares of the latter's stock, \$43,421.87 in cash and the assumption by the Borden Company of all of the outstanding liabilities of the Hendler Company, consisting of \$501,000 first mortgage bonds, current bank loans of \$1,050,000, and merchandise accounts of \$130,410.78. As a result of the transaction, the Hendler Company made a total calculated profit of \$6,608,713.65 based on the current market price of the Borden stock. After the transaction the Hendler Company discontinued business, filed its income tax return for 1929 and dissolved.

The Hendler bonds were subject to redemption on any interest date at 107½. In accordance with an understanding which preceded the agreement of May 21, 1929, the Board of Directors of the Hendler Company resolved on May 15, 1929, to call the bonds for redemption on July 1, 1929. The Borden Company, through the purchase of some of the bonds and the redemption of the rest, performed its promise to assume the payment of the bonds at a total cost to it of \$534,297.40. This sum did not pass through the Hendler Company but was paid directly to the bondholders. The Hendler Company did not include it in its income tax return for 1929 nor any part of the profit realized in the reorganization. The Commissioner reached the determination that while the total profit on the exchange was not taxable, the item of \$534,297.40 was taxable and made a deficiency assessment of \$58,772.72 with interest of \$10,781.97, which was paid by L. Manuel Hendler, as transferee. The present suit was filed to recover these amounts after a claim for refund had been denied. The District Court ordered the refund, finding a verdict for \$62,145.89 which represented the amount of the plaintiff's claim less an offset based on circumstances not involved in the pending case.

Section 112 of the Revenue Act of 1928, 45 Stat. 791, provides in part as follows:

"Sec. 112. Recognition of Gain or Loss.

"(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

"(b) Exchange solely in kind.—

"(4) Same—(Stock for Stock Reorganization)—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

"(d) Same—(Gain from Exchanges not Solely in Kind—Gain of Corporation.—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed."

The contention of the United States is that under section 112 (a) of the statute the entire amount of the gain or loss upon the sale or exchange of property is recognized in computing the income tax, unless the transaction falls within one of the exceptions enumerated in the section; and that the only exceptions relied upon by the taxpayer, to wit: section 112 (b) (4) and 112 (d) are not applicable to the facts of the case. It is not denied that there was a reorganization as defined in section 112 (i); see *Helvering vs. Minnesota Tea Co.*, 296 U. S. 378; *Helvering vs. Watts*, 296 U. S. 387; *G. & K. Mfg. Co. vs. Helvering*, 296 U. S. 389; but it is said that the taxpayer did not exchange its property in pursuance of a plan of reorganization solely for stock or securities in the Borden Company within the terms of section 112 (b) (4), but also received \$43,421.87 in cash and an assumption of the taxpayer's liability which included the bonded indebtedness discharged at a cost of \$534,297.40; and it is contended that this assumption of indebtedness was not money or property within the true construction of section 112 (d), or if it was money or property, it was not distributed in pursuance of the plan of reorganization within the terms of the section. Hence, it is said that the item of \$534,297.40 should be added to the taxable income.

At the outset we are assailed by the doubts aroused by the failure of the government to press its argument to the conclusion which would seem to follow if its premises, based upon a literal interpretation of the language, are sound. If the assumption of the bonded indebtedness did not constitute money or property, but nevertheless represented taxable value received by the taxpayer, it would seem that the transaction was not covered by the literal terms of either section 112 (b) (4) or section 112 (d), and that therefore the entire profit of \$6,608,713.85 was taxable under section 112 (a) of the statute; and on the other hand, if such assumption did constitute money or property not distributed under section 112 (d), manifestly the assumption of the current bank loans in the amount of \$1,050,000, and of the merchandise accounts in the amount of \$130,410.78 was of the same nature and these sums should have been added to the taxable profit. The omission of the Government in these respects is difficult to understand.

In our opinion, however, the decision of the District Court was correct. We do not question the rule that the payment of an obligation of a taxpayer by another person constitutes income to the taxpayer. *Old Colony Trust Co. vs. Commissioner*, 279 U. S. 716; *United States vs. Boston & M. R. Co.*, 279 U. S. 932; *Gold & Stock Telegraph Co. vs. Commissioner*, 83 F. (2d) 465; *Houston Belt & Terminal Ry. Co. vs. United States*, 250 Fed. 1; *Douglas vs. Willcuts*, 296 U. S. 1, 9; and of course the assumption not only of bonded indebtedness but also of all other forms of indebtedness owing by a taxpayer must necessarily be taken into account in computing the taxpayer's profit in a reorganization. However, it does not follow that the amount of indebtedness assumed is taxable as profit at the time that the reorganization is effected; and it is significant that the usual practice of the Commissioner has been quite to the contrary.

The sections of the Act in question must be construed in view of the purposes which they were intended to effect. It is well known that the purpose was to provide for the exemption from taxation at the time of a business reorganization of the gains involved therein to the extent specified in the statute in order to remove impediments to corporate readjustments and also to prevent the recognition of fictitious gains or losses. The history of the legislation and the committee reports in Congress clearly manifest this legislative intention. *C. H. Meade Coal Co. vs. Commissioner*, 72 F. (2d) 22, 27-28; *Minnesota Tea Co. vs. Commissioner*, 76 F. (2d) 797, 802. *Baar and Morris on Hidden Taxes & Corporate Reorganization*, p. 244. The result is to defer the taxation of such gains until they are subsequently realized by the corporation grantor or its stockholders through the liquidation of the securities or property received.

So it was provided in effect that no gain should be recognized in the exchange of property solely for stock or securities in the transferee corporation; or if the property received in exchange should also include property or money other than stock or securities, the gain should be recognized only to the extent that such other property or money was not distributed in pursuance of the plan of reorganization. Now it seems to us, bearing in mind the general purpose of the statute, that it was not the intention of Congress to recognize for immediate taxation the gain derived in a corporate reorganization to the extent it should consist of an assumption of the debts of the corporate grantor. Such an assumption is undoubtedly an asset of value and may fairly be called property in the broad sense; but the money spent in the performance of the promise passes to creditors and does not come into the possession of the debtor corporation or its stockholders. It reduces the debts and therefore frees the assets from the claims of creditors so that they may be lawfully distributed amongst the stockholders or otherwise disposed of; but it does not increase in their hands the assets whose liquidation brings about the actual enjoyment of the realized profit. Therefore the recognition of the gain, to the extent of the amount of the debt assumed, would not serve the statutory purpose, but on the contrary would tend to

defeat it. It is a matter of common knowledge that a promise by the grantee to assume the debts of the grantor corporation is a customary incident of reorganization agreements, and where the transaction yields a profit to the grantor, taxable gain up to the amount of the assumed debt would accrue in the current year if the present contention of the Commissioner is correct, whether or not at that time the corporation or its stockholders had actually realized the profit in the transaction.

It seems obvious that Congress in referring to the receipt of stock or securities in Section 112 (b) (4) and to the receipt of money and other property in Section 112 (d) had in mind the sort of property that is susceptible of distribution among stockholders. Indeed, this is part of the argument of the Government which asserts that a distribution in reorganization generally contemplates a distribution among stockholders and that it would be a distortion of language to misconstrue the word "distribute" to mean the payment of creditors. But it does not follow, as the government contends, that when the taxpayer secures an assumption of its debts in addition to stock and securities or distributable property, it is not entitled to the exemption claimed. Congress has adopted the realistic conception that the substantial value which a corporation owns is the equity in its corporate property—that is, the value of its assets after provision has been made for the payment of its debts; that what the grantee acquires in a corporate reorganization is this equity, and that its assumption of liabilities is merely the means by which it is enabled to acquire a good title to the grantor's property. If this viewpoint is kept in mind, it is clear that the grantor in a reorganization agreement receives nothing from the assumption of its debts by the grantee that prevents it from claiming an exemption under either of the cited sections of the statute.

It must not be supposed that the gain derived by the corporate grantor from the assumption of its debts will entirely escape taxation through this construction of the Act. Manifestly the price paid for the corporate assets by the grantee includes both the value which passes to the corporation or its stockholders and that which passes to its creditors; and the entire profit will be recognized, when upon the ultimate liquidation of the assets actually received by the corporation or its stockholders a comparison is made between that which was originally put into the venture and that which has been finally taken out.

We have been referred to the decisions in *Helvering vs. Minnesota Tea Co.*, 89 F. (2d) 711, and *Liquidating Co. vs. Commissioner*, 33 B. T. A. 1173, but insofar as they are at variance with the views herein expressed, we are constrained to disagree.

Affirmed.

Supreme Court of the United States

Order allowing certiorari

Filed December 6, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.